

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,815

MUTUAL BENEFIT HEALTH AND
ACCIDENT ASSOCIATION,

Appellant,

v.

MRS. JOSEPHINE L. MESSINA,

Appellee.

Appeal From the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

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(i)

QUESTION PRESENTED

Whether the fatal air taxi flight on which the insured lost his life was the type of flight, i.e. a flight "contracted for by" MATS, covered by the insurance policy on which his beneficiary has sued.

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v.

MRS. JOSEPHINE L. MESSINA,

Appellee.

Appeal From the United States District Court
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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from an order of the United States District Court for the District of Columbia, filed on April 24, 1964, and from an amended order, filed on May 28, 1964, which encompassed findings of fact and conclusions of law after a trial to the District Court without a

jury and entered judgment for the plaintiff-appellee in the amount of fifty thousand dollars (\$50,000) with six per centum per annum interest from March 16, 1960. (JA 28-39; 41-43)

Jurisdiction of the District Court was invoked under Title 11, Section 306, of the District of Columbia Code (1961 edition) and under Title 28, Section 1332, of the United States Code. This Court has jurisdiction under Title 28, Section 1291, of the United States Code.

STATEMENT OF THE FACTS

On or about January 25, 1960, the plaintiff's husband, Salvatore H. Messina, purchased an insurance policy issued by appellant-defendant association from appellant's sales agent at Tachikawa Air Force Base, Japan. (JA 86-89) He paid a premium of four (\$4) dollars for the policy and stated his destination to be Washington, D.C. The policy provided, inter alia, that benefits would be paid for loss of life, limb or sight resulting from accidental bodily injuries received,

While this policy is in force, between the Point of Departure and the Destination designated in the Schedule and for which the Insured has purchased a transportation ticket or has been issued a pass; provided such injuries are received (1) while riding as a passenger in, . . . an aircraft . . . (d) . . . contracted for, by the Military Air Transport Service (MATs) of the United States . . .

The other types of flights expressly covered in the policy are not quoted herein for the sake of brevity and because the plaintiff, in interrogatories propounded to her, stipulated that only the above provision of the policy, designated in parenthesis as "d", was germane to her action. (JA 5)

Diagonally across page one of the policy -- in green, a differing color, and in Eusebius, a much different style type than that used in the body of the contract -- the following warning appeared:

**READ CAREFULLY
THIS POLICY IS LIMITED
TO AIRCRAFT ACCIDENTS
ON SCHEDULED AIRLINES**

At the time Mr. Messina purchased this coverage, he was en route to the United States from Seoul, Korea, where his job as a construction representative with the Army Corps of Engineers had been terminated through a reduction in force. (JA 90) After purchasing the policy from appellant's agent, Mr. Messina was transported from Tachikawa, at no expense to himself, on a flight contracted for by Military Air Transport Service (MATS) in a plane operated by a commercial air carrier. (JA 28)

This overseas flight landed at its destination, Travis Air Force Base, California, sixty-seven miles north of San Francisco. (JA 28) Upon arriving there Mr. Messina obtained at the counter of the U.S. Air Force Transportation Officer a travel authorization (JA 105) for a one-way flight to Washington, D.C. via United Airlines from the International Airport at San Francisco.

With the travel authorization in hand, the insured negotiated through an agent of E & J Travel Bureau, a commercial travel agency located at Travis, for the purchase of an air ~~taxi~~ flight from San Francisco to Washington, D.C. via United Airlines, the price thereof to be charged to the United States government. (JA 105)

There were other modes of transportation available to carry civilian passengers from Travis Air Force Base to San Francisco International Airport. The air taxi was operated by the Travis Air Taxi Service of Vallejo, California (later called "Travis Transportation Company, Inc., d/b/a 'Golden Gate Airways' ") (JA 97-104)

Through the E and J Travel Bureau Mr. Messina arranged to take an air taxi flight to San Francisco International. The price for the air

taxi was fifteen dollars (\$15) which Mr. Messina paid in cash out of his own pocket. (JA 54) A Piper-Apache taxi plane left for San Francisco International on the evening of January 25, 1960, bearing Mr. Messina (JA 90) This air taxi later crashed, fatally injuring him. (JA 44)

The appellee, plaintiff-beneficiary under the policy sued on, mailed timely proof of Mr. Messina's death and notice of her claim to the appellant. (JA 28-29) On March 16, 1960, appellant denied liability on the policy on the ground the insured was not injured on a flight covered by the policy but, instead, had died while a passenger on an irregular, non-scheduled air taxi flight. (JA 117) Eight months later, in November of 1960, appellee filed her complaint in this case. (JA 1-2)

Several months prior to Mr. Messina's arrival at Travis (viz. February 2, 1959), the Travis Air Force Base commander, Col. Charles W. Stark, USAF, had forwarded a proposal of the Travis Air Taxi Service to the Regional Director, Western Traffic Region, Oakland Army Terminal (WESTAF). (JA 20-25) Colonel Stark requested that negotiations be undertaken for establishment of an air taxi service at Travis, saying

We have no objections to Air Taxi Service utilizing Travis provided the operator complies with CAA, CAB, California Public Utilities Commission and Air Force Directives and Regulations (JA 20)

On February 27, 1959, a "revocable permit" was issued by the base commander to Travis Air Taxi Service, later called "Travis Transportation Company, Inc., d/b/a 'Golden Gate Airways'." This permit stated, inter alia, that:

- (1) Travis Air Service could use the aircraft landing and parking facilities at Travis AFB without charge for the express purpose of providing air taxi service from Travis AFB to the San Francisco Bay area;

- (2) The revocable permit did not grant to Travis Air Taxi Service any exclusive franchise or license;
- (3) The revocable permit could be terminated:
 - a. at any time by mutual consent,
 - b. at will by either party upon thirty (30) days written notice,
 - c. immediately, without notice, by the Travis AFB commander upon noncompliance with certain terms and conditions set forth in the revocable permit granted to Travis Air Taxi Service,
 - d. immediately, without notice, by the Travis AFB commander when "emergency condition" existed or "operational necessity" made continuation of the permit unfeasible; and
- (4) Travis Air Taxi Service must abide by conditions outlined in the revocable permit and must adhere to regulations and directives issued from time to time by the base commander. (JA 97-104)

Thereafter, supplement #1 was added to the revocable permit in which the carrier agreed to comply with certain other operational requirements. A change (#1) was also added to the permit and to supplement #1. In change #1 Travis Air Taxi Service notified the Travis base commander that the company name had been changed to "Travis Transportation Company, Inc. d/b/a/ 'Golden Gate Airways' " and that the company accepted and agreed to be bound by all the provisions of the revocable permit. (JA 102-104)

STATEMENT OF POINTS

1. The decedent's fatal flight was not within the coverage contracted for.
2. The fatal flight was not "contracted for by" MATS, but rather by the decedent himself.

3. The District Court erred in applying the wrong law in interpreting the insurance policy and finding ambiguities therein.

4. The District Court erred in holding that the insurance policy sued on contained ambiguities.

5. Lacking ambiguities, the insurance policy should not have been liberally construed but should have been applied according to the tenor of its unambiguous words.

6. The District Court erred in holding that the Revocable Permit constituted a contract between MATS and Travis Air Taxi Service.

7. Certain conclusions of the District Court were based upon inadmissible items of evidence.

8. The District Court erred in awarding appellee interest at six per centum per annum since March 16, 1960.

SUMMARY OF ARGUMENTS

The insurance policy upon which appellee-beneficiary has sued covered six types of airplane flights. Appellee eliminated five types of flights as applicable by her answers to appellant's Interrogatories. Appellee tried her case solely on the theory that her husband perished on an air taxi flight which came within the policy's coverage as a flight "contracted for by" MATS.

Appellant has met this appeal's sole issue, i.e. whether the fatal flight was "contracted for by" MATS, with a full argument showing that MATS had nothing whatever to do with the insured's fatal airtrip. Since the fatal air taxi flight was not "contracted for by" MATS, the insured did not perish on one of the six types of flights covered by the policy. Hence, his beneficiary should be denied recovery.

Interest on the policy proceeds was an issue in the Court below where appellee was allowed recovery. But appellant shows herein that

interest should not be granted to appellee because she is not entitled to recover on the policy in the first instance and because on these facts appellee does not merit an award of discretionary interest.

ARGUMENT ONE

THE FATAL FLIGHT WAS NOT WITHIN THE COVERAGE CONTRACTED FOR

A. The Fatal Non-Scheduled Air Taxi Flight Was Not A Flight Included Among Those Expressly Contracted For By The Decedent and The Defendant Insurer.

The sole basic issue in this appeal is whether the fatal air taxi flight in which the decedent lost his life was a covered flight, i.e., one included in the types of flights expressly agreed upon in the accident insurance policy purchased by the deceased.

We are dealing here with a four page contract (JA 86-89) which set forth in ten-point type on page one, and five lines of page two, six types of aircraft flights included in the coverage. At a glance the reader observes that the first three of these flights expressly refer to scheduled airlines. The fourth refers to one operated by, or contracted for by, the Military Air Transport Service (MATs) of the United States. The remaining two refer to certain divisions of the Canadian and United States Military.

The Piper-Apache air taxi plane in which the decedent met his fate was not operated by a scheduled airline or any of the other agreed agencies. Neither was the fatal flight — despite plaintiff's insistence — contracted for by MATs. It was contracted for by the deceased himself.

After the question of which of the six covered flights the plaintiff sought to recover upon was narrowed down to the fourth, the one designated in the policy as "(d)", viz., a flight contracted for by MATs

(JA 4-7;17-18), and she was then asked to identify the said contract, the plaintiff adopted the somewhat ingenious theory that a "revocable permit" issued by the base commander of a United States Air Force base to the air taxi carrier (JA 5, 7, 18) made the fatal flight, purchased by the decedent, one "contracted for by" MATS.

The fallacy of this theory will be demonstrated in Section B. The decedent arranged for and purchased the fatal flight with the private air carrier entirely on his own. MATS was not at all involved.

No attempt was made by the decedent's personal representative in more than three years to obtain reimbursement for the fifteen (\$15.00) dollar taxi fare. (JA 55-56) Nevertheless, the District Court urged that evidence be adduced on whether it was reimbursable. (JA 67-70) Asked by the Court if he did not think this question to be important, counsel for appellee replied that he did not. (JA 68)

After trial was delayed for the purpose, by proffering, over the objection of appellant's counsel, (JA 77, 82-83) a copy of Travel Regulations CPR T3, revised June 18, 1959, (JA 118-128) appellee attempted to show that Mr. Messina or a representative of his estate may have been entitled to reimbursement from the Government for the cash fare paid by the insured for the air taxi flight.

These regulations, however, do not prove that either the insured or his representative would definitely have received reimbursement from the Government. Appellee's counsel conceded that the General Accounting Office would not render an advisory opinion concerning reimbursement because no claim had been filed. (JA 75) Even if a claim had been filed, appellee's counsel admitted in response to the Court's query that there was no certainty of reimbursement. (JA 81) Although appellee's counsel relied upon portions of these regulations which governed the use of "taxicabs" (JA 80-81) to establish that re-

imbursement would be forthcoming since the accident had occurred on an air "taxi", appellee's counsel failed to consider the following points:

- (1) any award of reimbursement would involve the discretion of an appropriate government official (JA 80-81);
- (2) the air taxi flight in which decedent was killed was an aircraft, not a surface taxicab as the proffered regulations provided (JA 80);
- (3) no General Accounting Office ruling was introduced to support appellee's allegation that the portion of the regulations pertaining to surface taxicabs also encompassed airplanes (JA 75);
- (4) any reimbursement for use of the special conveyances provided by the regulations would be approved only where authorized in the Travel Orders or approved as advantageous to the Government. (JA 120)

In connection with point (4), appellant emphasizes that Mr. Messina's Travel Orders did not show any authorization for an air taxi flight, and appellee failed to introduce any evidence that such flight was advantageous to the Government.

Army Regulation 55-355, paragraph 304011 (JA 124) relied upon by appellee, does not buttress her allegation of any right to reimbursement. The use of the verb "may" in Section 304011 of AR 55-355 indicates that reimbursement would be discretionary. Appellee introduced no evidence, to satisfy the requirements of AR 55-355, that an emergency required the insured to use an air taxi, that other forms of transport were unavailable, that the interest of the Government was served by the air taxi flight (no such statement appeared in the insured's Travel Orders), or that the Government Transportation Request authorized travel by air taxi.

Despite the appellee's averment to the contrary and the solicitude of the Court to encourage her to support it, the stark fact remains that Mr. Messina himself contracted for his fatal flight, paying cash for it

out of his own pocket; MATS had nothing to do with it. Neither Mr. Messina nor his estate had sought reimbursement for this cash fare and, clearly, under the Army Regulations introduced by appellee, reimbursement, if requested, would have been denied as unauthorized by the insured's Travel Orders, the Government Transportation Request, or any other provision thereof. But if it were reimbursable, what bearing would that have on the risk assumed by the defendant?

Although the District Court found that "Mr. Messina could have been reimbursed for the air-taxi flight out of Army funds," it went on to add: "However the Court is not relying on these facts [including its conclusion that the decedent was on duty status] as essential to its decision." Even, if, for the sake of argument, it were conceded that the revocable permit constituted a contract, it would not make the fatal flight contracted for by anyone other than the deceased himself.

This was the sole basic issue in the case, and having failed to carry her burden of proving that the deceased lost his life in a flight, the risk of which was assumed by the defendant for the consideration received, it was error for the District Court to deny the plaintiff's Motion for Judgment at the close of the plaintiff's case.

B. The Fatal Air Taxi Flight Was Not Contracted For By MATS But By The Decedent Himself.

The deceased's fatal flight clearly was not an interstate flight of a scheduled airline described in the first of the six expressly covered flights in the policy's insuring clause, designated type "(a)". Neither was it an intrastate flight of a scheduled airline certificated as described in the same clause as type "(b)", or a scheduled flight of a foreign airline contemplated in type "(c)". (JA 86) After expressly disavowing these and other flights designated in the policy (JA 6-7), the plaintiff averred that the part of the insuring clause on which she

based her cause of action was "(d)", the flight "contracted for by MATS". (JA 5,7)

In reply to another interrogatory, No. 3, appellee said she was relying on the Revocable Permit (JA 18) issued February 27, 1959, by Charles W. Stark, Colonel, USAF, Base Commander, Travis Air Force Base, California, to the air taxi carrier, as the basis of her claim that the fatal flight was "contracted for by MATS". (JA 5,7). At trial, in response to the Court's query about whether the revocable permit was a contract, appellee's counsel admitted: ". . . this question is really, I think, the question this Court is going to have to decide. . . ." (JA 65)

The full narrowing of the issue herein to whether the fatal flight was one "contracted for by" MATS was made in the District Court's Memorandum (as amended). There the Court stated: "the issue in this case is whether the fatal flight was 'a regular, special or chartered flight * * * contracted for by, the Military Air Transport Service (MATS) . . .'" (JA 31) The Court concluded that operation of the fatal flight by MATS personnel was not in issue, saying:

It is conceded by plaintiff that the fatal flight was not 'operated * * * by MATS, since it was not operated by MATS personnel and since the aircraft itself was not owned by the United States Air Force. The issue is thus limited to the above-quoted portion of the policy dealing with flights 'contracted for' by MATS. (JA 42)

Notwithstanding the narrowing of the issue by appellee's answers to appellant's interrogatories, by the admission of appellee's counsel, and by the findings in its own Memorandum, the District Court discussed a broader issue in its opinion, viz. whether the entire airtrip, planned by the insured from Tachikawa to Washington, was covered by the policy. The District Court decided that a reasonable person in the insured's position would have believed he was protected by insurance

on his entire airtrip. (JA 32-33) From this conclusion the Court reasoned that the fatal air taxi flight was covered. (JA 36-37)

Appellant maintains that the issue in this appeal is only whether the fatal flight was covered, not any and all flights the deceased might take on his way home. The broadening of this issue by the District Court was erroneous. Therefore, appellant respectfully requests this Court to concentrate its attention only upon the fatal flight and to decide whether this air taxi trip was covered by the policy upon which appellee has sued.

Mr. Messina, who back in Japan had purchased the policy from the defendant's sales agent, contracted for his fatal air taxi flight, not MATS. (JA 44) He himself arranged for the air taxi trip on a non-scheduled airline through the E and J Travel Bureau at Travis Air Force Base. (JA 54) He paid the fifteen (\$15.00) dollar cash fare out of his own pocket. (JA 54)

This uncovered means of getting to San Francisco International Airport, chosen by Mr. Messina at Travis at the same time he arranged for his flight from San Francisco to Washington (JA 54-55), obviously was not contemplated by him back in Japan when he purchased his policy. If it was, he deliberately chose to be content with the economical policy he purchased rather than to buy a broader form of coverage that would include non-scheduled airline flights at a premium commensurate with the greater risk.

Although it was the burden of the plaintiff to prove his assertion that the fatal flight was contracted for by MATS, not the slightest bit of evidence was adduced by the plaintiff directly on this point. Instead, all the evidence (adduced by herself) was to the contrary.

The president of the air taxi carrier asserted that he had no contract with MATS (JA 52-53). The very head of MATS, Joe W. Kelly,

Lt. General, USAF, Commander, Military Air Transport Service, affirmed that the fatal flight was not one contracted for by MATS. (JA 64-65) Both these sworn assertions stand uncontradicted.

The District Court has misconstrued the meaning of a flight "contracted for by" MATS, and its finding in behalf of the appellee based on such error should be reversed. In the deposition of MATS' commander, Lt. Gen. Joe Kelly, which was put into evidence by appellee, such a flight was described as follows:

- A. Airlift contracted by and for MATS is air transportation service furnished by a commercial carrier pursuant to a contract between the carrier and the U. S. Government, represented by MATS as an airlift service agency for the Department of Defense. The contract defines the terms of service to be provided and the price to be paid therefor by the government. (JA 65)

General Kelly stated categorically that the fatal flight was not "contracted for by" MATS, (JA 64-65) and that evidence is unopposed.

C. The Revocable Permit Did Not Constitute A Contract Between Mats And Travis Air Taxi Service.

The appellee's allegation that the decedent's fatal flight was contracted for by MATS was pursued entirely on a collateral issue created by her, namely, that the revocable permit issued by the base commander at Travis constituted a contract. But the basic element of appellee's premise is fallacious. Assuming arguendo that a contract did exist between Travis Air Taxi Service and MATS, such fact would not, ipso facto, make the fatal flight one "contracted for by MATS". As just demonstrated, the fatal flight was clearly contracted for by Mr. Messina himself who elected to go from one airport to another by non-scheduled air taxi rather than the other modes of transportation available, paying the cash fare out of his own pocket.

Appellee urges that the fatal air taxi flight was "contracted for by" MATS because such flight was made pursuant to a revocable permit issued on February 27, 1959, by the then U.S.A.F. commander of the Travis Air Force Base, Colonel Stark, who at the time was assigned to MATS. At that time MATS shared the base with other commands of the Air Force, such as the Strategic Air Command (SAC), Air Defense Command, (ADC), et cetera. (JA 63-64) When Colonel Stark issued the permit, the base was a United States Air Force base, not exclusively a MATS base; MATS had merely been assigned the maintenance or housekeeping responsibilities there in addition to its basic function of providing the United States Air Force with airlift for its men and material. (JA 64) Previously, these extracurricular chores of a "host organization" had been performed at Travis by the Strategic Air Command. (JA 73-74)

Because Colonel Stark was temporarily assigned to MATS when the revocable permit was issued, his act did not make the permit an instrument of MATS. Nowhere in this permit does the name "MATS" appear. Whether or not this instrument can constitute a contract will depend more on an analysis than to which command of the Air Force Colonel Stark happened to be assigned when he issued it. Such an analysis follows. For the moment, however, it seems fair to say that if the revocable permit had been issued at a time when SAC was assigned the housekeeping chores, it would be equally invalid to say the revocable permit constituted a contract of SAC.

The District Court, however, concluded that the revocable permit "has all the essential elements of a contract. . ." (JA 36) From this conclusion the District Court reasoned that the fatal "flight was one 'contracted for by' MATS". (JA 36-37) Appellant submits that the District Court's reasoning is erroneous for two reasons:

- (1) the fatal flight was contracted for by Mr. Messina (as Part B of this Argument shows) regardless

of whether a contract existed between MATS and Travis Air Taxi Service; and

- (2) the revocable permit lacked the requisite elements of a valid contract.

The revocable permit was found by the District Court to embody a contract because "a reasonable person in Mr. Messina's position" would have so concluded. (JA 36) The Court dismissed appellant's argument that no contract existed because express authority to bind MATS (a part of the United States Government) was lacking in Colonel Stark, with this questionable statement:

. . .any lack of authority to 'contract' on behalf of MATS in some other regard is irrelevant to this case. In any event, since the issue in this case is whether a reasonable man in Mr. Messina's position would have interpreted the insurance policy as covering this flight as one 'contracted for by' MATS, such a reasonable man would have been justified in relying upon the Base Commander's apparent authority (as distinct from actual authority) in 'contracting' on behalf of MATS. (Emphasis supplied) (JA 37)

The basis for the District Court's reference to "any lack of authority to 'contract' on behalf of MATS in some other regard" (emphasis supplied) is quite obscure to this reader. The only showing of any lack of authority the appellant is aware of is the lack of the said base commander's express authority to bind MATS in contract for flights such as the fatal one herein. (JA 37)

The "reasonable man test" applied by the District Court does not elevate the revocable permit to the status of a contract because Colonel Stark, as a representative of the United States Government, lacked express authority to bind MATS. What Mr. Messina would personally have believed the document to be does not make the revocable permit a contract and does not confer express authority on Colonel Stark to bind

MATS where the latter had no such authority. The District Court failed to cite case precedents which would justify reliance upon the "reasonable man test" to change the revocable permit into a contract. This omission suggests that there may be no precedent supporting such a "test".

Re: Lack Of Express Authority

It is an elemental principle of government contract law that, where the United States Government (or one of its branches or departments) is an alleged party to a contract, express authority in the government's contracting agent must be shown by a preponderance of the evidence.

Illustrative of this is the case Whiteside v. United States, 93 U.S. 247, 28 L.Ed. 882, wherein the United States Supreme Court held that the superior of an Assistant Special Agent of the Treasury Department could not ratify an act of the agent which was outside his authority where the promise of the agent exceeded the Treasury Regulations. Likewise in Federal Crop Ins. Co. v. Merrill, 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed. 10, 175 A.L.R. 1075, our highest tribunal held that a wheat-grower could not recover on a policy of insurance issued by the agent of a wholly-owned government corporation because the policy exceeded the scope of the agent's authority under regulations, published in the Federal Register, of which both the agent and wheat-grower claimed to be ignorant. Restating the doctrine that the United States cannot be bound or estopped by the acts of its officers or agents into entering an agreement which its laws do not sanction or permit, the Court, speaking through Mr. Justice Frankfurter, noted that:

Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority.

In Steele v. United States, 113 U.S. 128, 5 S.Ct. 396, 28 L.Ed 952, the U.S. Supreme Court held a plumbing contractor was not entitled to keep the proceeds from the sale of salvage taken from old ships since his account had been settled by officers of the Navy without express authority of law. In Utah Power & Light Co. v. United States, 243 U.S. 389, 37 S.Ct. 387, 61 L.Ed. 791, it held that the United States was not estopped from asserting rights in public lands which had been employed in generating and distributing electricity, even where the agents of the forestry service and other government officers and employees knew the generating plants had been erected on these lands and impliedly acquiesced in their presence.

In Rock Island, A. & L. Ry. Co. v. United States, 254 U.S. 141, 41 S.Ct. 55, 65 L.Ed. 188, a tax case wherein strict compliance with the Treasury Regulations was not observed by the taxpayer, the Court, in a decision written by Mr. Justice Holmes, declared that:

Men must turn square corners when they
deal with the Government.

Where a Government agent acts to bind his principal, express authority under an enabling statute or regulations validly issued pursuant thereto must be shown.

Appellee did not adduce any evidence showing that Colonel Stark had express authority to contract on behalf of MATS for a flight such as the fatal one herein. The deposition of Lt. Gen. Joe W. Kelly, Jr., USAF, Commander of MATS, flatly negated any such authority in Colonel Stark. (JA 64) This deposition was introduced into evidence by appellee herself. Although appellee's counsel reserved the right "to contest General Kelly's opinion", (JA 64) no attempt was thereafter made to contradict General Kelly's statements. Hence, General Kelly's declaration that Colonel Stark had no authority to bind MATS respecting such a flight and (in General Kelly's knowledge) did not so bind MATS stands uncontradicted.

Similarly, the subject of implied authority originated in the argument of appellant's counsel who pointed out the absence of any such authority in a Government agent. Without any assistance whatever from the appellee at trial or in his brief, however, the District Court glossed over this defect by stating that a reasonable man would have been justified in relying upon the Base Commander's "apparent" authority. (JA 37)

Re: Lack Of Mutuality

Besides the lack of express authority in Colonel Stark, the government's purported contracting agent, the revocable permit failed as a contract because there was no mutuality of obligation. From the testimony of the president of the air taxi carrier (JA 52-53) and that of the commander of MATS, (JA 64-65) neither of the parties intended that contract arise. Their undertaking that no legal obligation be created by their words and acts should be respected by this Court as would any other term of the permit. Pool v. Brotherhood of R.R. Trainmen, 143 Cal. 650, 77 P. 661 (1904) The parties did not use the language of contract, speaking only of a "permit".

The air taxi carrier paid nothing for the privilege of using the aircraft landing strip and parking facilities at the air base. No exclusive rights inured to the carrier under the permit. The statement found in the "permit" of the base commander's willingness to extend to the carrier a limited use of the base premises did not constitute a promise or even an indication that the carrier would be assured the continued use of the premises.

The essence of the contract element "consideration" is mutuality. Black's Law Dictionary, 3rd Ed., p. 1219, citing Barker v. Hauberg, 325 Ill. 538, 56 N.E. 806, 808, defines mutuality as "that which requires a contract to be of such a character that at the time it was entered into it might have been enforced by either of the parties against

the other." The United States Supreme Court stated the rule succinctly in Tilley v. County of Cook, 103 U.S. 155, 161, 26 L.Ed. 374, when it said: "Both parties to a contract must be bound or neither is bound".

Were the base commander in this instance to arbitrarily exclude the air taxi service from the base premises, the carrier would have had no legal remedy. The parties completely failed to confer legally enforceable rights on each other in the revocable permit. No liquidated damages were contemplated in the revocable permit in case of abortive termination of base privileges without thirty days' written notice. Also, no suit would have been permitted against the Government without waiver of its sovereign immunity. Kansas v. United States, 204 U.S. 331, 27 S.Ct. 388, 51 L.Ed. 510.

True, the base commander laid down certain conditions precedent before he issued the revocable permit but the carrier suffered no detriment, in law or in fact, by accepting the permit under these circumstances since it gave up no rights and did not bind itself to any enforceable obligation to make any flights out of the air base. If it arbitrarily refused carriage of passengers or ignored the departure schedule specified in the permit, the base commander's only remedy would have been to exclude the carrier from the base.

The District Court's attempt to find consideration in the supposed detriment to MATS in the wear and tear upon the runways and other facilities is obviously more than a bit strained. To begin with the runways and other facilities do not belong to MATS. As has been said before, nowhere in this "permit" is any reference to MATS, direct or indirect, to be found. Colonel Stark issued the permit "for and in behalf of the United States". (JA 97) More to the point, however, is the fact that no detriment was suffered because the grant of use to this carrier was not exclusive. The Air Force could admit any other carrier to its base premises for the purpose of doing business there.

The controlling case decision on this point is Alameda County, California v. United States, 124 F.2d 611, which in 1941 came to the Ninth Circuit from the United States District Court sitting in California. In Alameda, the Court applied California law under the rule of Erie Railroad Company v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487.

In Alameda, the Secretary of War granted a license to Alameda County to assume control of three bridges constructed by the Corps of Engineers over a canal in an area near San Francisco. This license was subject to four conditions pertaining to the manner in which the County was to maintain these bridges under the supervision of an Army engineer officer.

In 1913, the County Board accepted the license and agreed to the conditions and to assume all future cost of repair, operation and replacement. During the next thirty years the County expended over \$703,000 on these bridges. Eventually, the County Auditor refused approval of a voucher for repair materials on the ground that the license imposed no contractual obligation on the County to make any repairs. A writ of mandamus brought against the Auditor by the County Board was denied on the holding that the license was void because, being revocable at will by the Secretary, it lacked mutuality of obligation, viz., consideration. On appeal this holding was affirmed in Alameda County v. Ross, 32 Cal. App. 2d 135, 89 P. 2d 460.

Thereafter, the United States brought suit in the United States District Court seeking to require the County to provide repairs, and obtained a favorable order. In reversing, the United States Circuit Court of Appeals observed that there was nothing in the statute under which the Secretary of War acted which conferred on the County any right against the United States. It simply decreed that the three bridges "may be turned over to the local authorities to be maintained and operated by them upon such terms as to transfer and control as in the

discretion of the Secretary of War may be equitable and just to the United States and to the said local authorities".

Continuing, the Court added, it did not purport to impose any obligation on the County, or to specify the terms of the transfer and control. Whether the power of the Secretary of War to enter into a contract at all was specified in the statute, the terms to be included in the contract to be thereafter entered into were not specified and there was nothing in said statute which purported to confer on the County any power whatever, even if it could do so. Likewise, there was nothing in the statute which purported to validate a contract in advance.

The basis of this holding was the license specified by its terms that the Secretary of War could terminate the license at will. The Ninth Circuit applied the California state court's determination that the instrument, as an enforceable contract, was void because, inter alia, it lacked mutuality of obligation.

Here, as in Alameda, the "permit" or license was terminable at the will of either the licensor or licensee. It has been observed that the base commander could terminate the license at will without incurring liability. It should also be noted that the reverse was equally true. If the Travis Transportation Company failed and refused to live up to any of the conditions precedent laid down by the base commander, he too would have been powerless to enforce them. He could have terminated the permit -- to be sure -- but termination is not enforcement.

That this "revocable permit" was, in law, not a contract is made perfectly clear by the fact that Travis Transportation Company was not bound by it to perform any service to the base or to MATS. Although the revocable permit authorized Travis Transportation Company to use government-owned facilities under certain conditions, it imposed no duty on Travis Transportation Company. If the company, after the issuance of the revocable permit, failed to provide the air taxi service,

it incurred no liability to MATS or to the base commander for damages for breach of its conditions. This absence of duty and absence of liability are determinative of the question.

Thus, as in Alameda, the instrument under discussion, designated a "revocable permit", fails as a contract because, inter alia, it lacks any mutuality of enforceable obligation and provides one more stage at which the motion of the defendant herein for judgment should have been granted.

Finally, it goes without saying that the Air Force sought to benefit through the issuance of this permit. It is not to be presumed that extending the privileges it did to the carrier was altogether altruistic. Certainly the Air Force felt that in certain instances, particularly those involving military personnel on official or emergency missions, the air taxi transportation service would be expeditious.

The criterion for the correct assessment of an alleged benefit, however, is as the court said in Barker, supra, whether it can be enforced against the promisor. As we have seen in this instance, the carrier's commitments could not be. The base commander's only recourse in the event of a failure on the part of the carrier would be exclusion.

Court action would not be necessary for the exclusion of the carrier from the base because the permit specified that privileges thereunder could be terminated by the Base Commander "upon noncompliance by TAS with any of the terms and conditions set forth. . ."

(JA 97) The Government would not have sued the air taxi service for damages; no damages were ascertainable or envisioned. Since the permit was no more than what was called a nudum pactum at earlier common law, i.e., an agreement naked of consideration, no privity of contract existed between the United States and the air taxi carrier. Hence, the holding of the District Court herein that "the essential

requisites of a contract were thus present" and the court's conclusion "that for the purposes of determining whether this flight, was covered by the insurance policy, the flight was one 'contracted for by' MATS" is clear reversible error and must be rectified.

D. The District Court Erred Applying the Wrong Law Interpreting the Insurance Policy and Finding Ambiguities Therein.

At the request of the District Court, appellant and appellee briefed the question of which law should govern the interpretation of the policy. (JA 31) Appellant argued in its Trial Brief that, under the well-established conflict of laws rules laid down by the Supreme Court and applied by the local courts, the law of the place where the insurance contract was made, which was Japan, should govern the interpretation of the policy at issue. Appellee, on the other hand, maintained that the "center of gravity" or "grouping of contacts" method, urged by the Restatement of Conflict of Laws 2d, and adopted by the New York Court of Appeals, should control the interpretation of the policy and that, therefore, American law, as opposed to Japanese law, should be applied. Appellee failed to specify which State's law within the United States should govern, saying simply in her Trial Brief:

. . . in the absence of any indication that there is a difference between the laws of the various jurisdictions with respect to the interpretation of insurance policies, this question need not be decided.

The District Court accepted appellee's suggested choice of law and applied American contract principles when interpreting the insurance policy. (JA 31) The District Court did not rely upon the law of any particular State but preferred, instead, to follow general contract principles, citing only the New York case of Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99.

In applying general American contract principles the District Court committed two errors: first, by following American, as opposed to Japanese, law; second, by failing to apply the law of a particular State within the United States.

It has been consistently held by the United States Supreme Court that matters pertaining to validity, execution and interpretation of contracts are governed by the law of the place where the contract was made unless the parties clearly appear to have some other law in mind. Scudder v. Union National Bank, 91 U.S. 406, 23 L. Ed. 245; Liverpool & G.W. Steam Co. v. Phenix Insurance Co., 129 U.S. 397, 32 L. Ed. 788, 9 S. Ct. 469. This rule has been steadfastly adhered to by the local courts. Croissant v. Empire Realty Co., 29 App. D.C. 538; Bayside-Flushing Gardens v. Beuermann, 36 F. Supp. 706.

Where several steps are necessary for the formulation of the contract, the locus contractus is deemed to be the place where the last act necessary to complete the agreement took place. Goodrich, Conflict of Laws (3rd ed., 1949), pp. 309 and 311. In the present case, the policy was prepared by appellant's home office but did not become binding until countersigned by appellant's agent, Betty Jane Ginder (JA 89), in Japan. Since appellee made no showing at trial that the parties intended other than the law of Japan to apply, under the well-recognized conflicts rule the District Court's interpretation of the policy should have been governed by the law of Japan, where the last step necessary to make the policy enforceable against appellant, viz. signature of appellant's agent, took place.

The District Court rejected application of the proper rule and chose, instead, to follow the Restatement of Conflicts "center of gravity" or "grouping of contacts" method to interpret the policy. See Restatement 2d, Conflict of Laws (Tentative Draft No. 6, 1960) Ch. 8, sec. 332, 332b, 334e.

But the District Court even misapplied the Restatement "center of gravity" method because the Court never decided which particular State had the closest contacts with the parties and with the subject matter of the contract. The District Court merely chose a particular nation (viz. United States) with close contacts and applied its general contract principles.

The District Court felt that general, American contract principles could be relied upon because " . . . neither party has suggested that the courts of any one state would decide the issue presented herein any differently from the courts of other states." (JA 32) However, the burden of showing similarity or dissimilarity of State laws rested upon appellee, not upon appellant. Appellant vigorously maintained in its Trial Brief that Japanese law, not domestic law, applied. Hence, appellant was under no obligation to discuss domestic State law. Any discussion of State law should have come from appellee. The District Court erred in resolving choice of domestic State law against appellant, where appellant failed to discuss domestic law only because foreign law was applicable.

The District Court applied the "center of gravity" rule without the benefit of proper oral argument and without full discussion of case precedents. The rule was not even adopted in the body of the Court's memorandum but was relegated to a footnote which included a citation to only one case, Auten v. Auten, supra, which is not even a local decision. Appellant submits that, if the Court of Appeals wishes to affirm the District Court and adopt the Restatement of Conflicts 2d rule for the District of Columbia, such adoption should be made only after weighty consideration that one hundred and twenty-five years of case authority have given the existing rule that the applicable law for interpreting contracts is the lex loci contractus.

In its Trial Brief appellant maintained that appellee's suit should have been dismissed for failure to allege and prove the law of Japan.

The District Court erred " . . . in assuming that Japanese law contains the same governing principles of the law of contracts" as American law. (JA 32) In Liverpool & G.W. Steam Co. v. Phenix Insurance Co., supra, Mr. Justice Gray, speaking for a majority of the Supreme Court, said at 9 S.Ct. 473:

The law of Great Britain since the declaration of independence is the law of a foreign country, and, like any other foreign law, is matter of fact, which the courts of this country cannot be presumed to be acquainted with, or to have judicial knowledge of, unless it is pleaded and proved. The rule that the courts of one country cannot take cognizance of the law of another without plea and proof has been constantly maintained, at law and in equity, in England and America. (Emphasis supplied.)

The appellee never did plead or prove Japanese law. Neither did the appellee ask the District Court to take judicial notice of Japanese law or any similarity between Japanese and American law. But even if such request had been made by appellee, judicial notice thereof could not have been taken by the District Court because such law " . . . is matter of fact which the courts . . . cannot be presumed to be acquainted with, or to have judicial knowledge of, unless it is pleaded and proved." Also see Walton v. Arabian American Oil Company, 233 F.2d 541, cert. den. 352 U.S. 872, 77 S.Ct. 64, 1 L.Ed. 2d 58, where the Second Circuit, per FRANK, J., affirmed a judgment for defendant because plaintiff, in a tort action, failed to prove the law of Saudi Arabia where the accident occurred. By "assuming that Japanese law contains the same governing principles" of contracts as American law, the District Court violated the rule of the Phenix Insurance case and committed reversible error.

E. The District Court Erred in Holding That There Are Ambiguities in the Policy Under Consideration.

Express language in the policy exempted the appellant from liability for injuries sustained in the crash of an unscheduled, commercial airlines plane. In larger, 24-point Eusebius type, which differed from the large ten-point Century type used in the body, and green in color, which also differed with the contrasting black ink used in the body, the following warning was printed over the insuring clause on page one of the policy:

READ CAREFULLY
THIS POLICY IS LIMITED
TO AIRCRAFT ACCIDENTS
ON SCHEDULED AIRLINES

The printing of this warning was also at a diagonal to the lines of the insuring clause, thereby making the warning stand out in four ways: in exceptionally large type, in differing style type, in contrasting color, and in slanted format.

Appellant takes this occasion to admit there is no evidence in the Transcript supporting the above-mentioned description of the precise type size of the policy. This liberty, appellant trusts, will be deemed justified when it is realized that the alleged "small" size of the black type, together with the alleged "pale" green printing of the warning, is characterized in the District Court's findings as so difficult to read that "a casual reader would be likely to fail to read the green type at all." (JA 31)

The characterization is another of the various means, originated by the District Court, to offset the obvious lengths, taken by the appellant association, to warn prospective purchasers of the limitation of coverage in the policy to scheduled, commercial airline flights. No word of complaint was uttered by appellee about the size of the type or the legibility of the warning, either at trial, in her pleadings, in

her argument, or in her Memorandum Brief filed after trial. Appellant, therefore, was given no indication that the type size was in issue.

Under these circumstances appellant respectfully trusts it may not be considered improper to invite this Court to take judicial notice of the type size, if this Court is familiar with the size, or, if the Court is unfamiliar, to confirm the size, as asserted by appellant, by measuring the type with a printer's rule.

In support of its present contention that the ten-point black type used in the body of the policy is not "small" type but is the size type adopted as a fair-sized type for insurance policies, appellant refers this Court to District of Columbia Code (1961 ed.), Title 35, Section 712 (2) (a) (4), pertaining to type size in insurance policies. See also Rule 420, Article 2, General Rules and Regulations under the Securities Act of 1933, which prescribes ten-point type for prospectuses coming within the Act's purview.

At the heading of the policy, in large boldface type, was a statement that the policy provided benefits for accidental bodily injuries " . . . Received While a Passenger on Scheduled Airlines . . . " Throughout part (1) of the insuring clause, each mention of the noun "airline" was preceded by the adjective "scheduled," for example

- (1)(a) "by a scheduled airline . . .,"
- (1)(b) "by an interstate scheduled airline . . .,"
- (1)(c) "by a scheduled airline . . ." (Emphasis supplied.)

While the coverage of the policy for trips on commercial passenger aircraft was limited to flights on scheduled airlines, nevertheless the policy offered broader coverage. The large boldface print at the heading of the policy indicated that coverage was provided for flights on certain other conveyances, reading: " . . . Provides Benefits for Loss . . . Resulting from Accidental Bodily Injuries Received While a Passenger on . . . Other Specified Conveyances . . . " In part (1) of the insuring clause the insured was extended coverage for flights (whether regular, special or chartered) on the following conveyances:

- (1)(d) MATS operated aircraft or aircraft "contracted for by" MATS,

- (1)(e) RCAF or RAF Transport Command aircraft,
and
- (1)(f) USAF aircraft of 315th or 322nd Air Division
or of 5060th Transportation Squadron.

The enumeration of these conveyances did not include unscheduled, commercial airlines' aircraft.

Besides coverage for regularly scheduled, commercial airlines flights and for other flights on certain specified aircraft, the policy provided coverage for " . . . Losses Resulting from Accidental Bodily Injuries Received . . . While on the Premises of an Airport to the Extent Herein Provided" (boldface heading of policy). Part (2) of the insuring clause defined this coverage:

while in or upon any premises or surface vehicles . . . , but only while the Insured is in or upon such premises or surface vehicle for the purpose of beginning, continuing or completing the airtrip designated in the Schedule.

In recapitulation, the full coverage of this policy extended to injuries suffered while a passenger of a regular, special or chartered flight of scheduled commercial airlines, of aircraft operated by or "contracted for by" MATS, on the aircraft of certain named USAF commands, and at certain times in airports and on surface vehicles.

The District Court found that Mr. Messina died while a passenger on a nonscheduled airline — an "'air taxi' — a non-scheduled service operating between the two airports" (Travis Air Force Base and San Francisco Airport). (JA 28) The District Court ruled that this fatal flight on a nonscheduled airline came within the policy's coverage and, therefore, allowed the appellee to recover on her claim. In so finding, appellant submits, the District Court ignored the plain, unambiguous language of the policy.

The District Court found ambiguities in the policy. First, the Court found a supposed conflict between the green-letter warning and the boldface heading and body of the policy. (JA 32) Second, the Court found a supposed conflict between the green-letter warning and

part (1) of the insuring clause. (JA 32-33) Third, the Court found that the language of part (2) of the insuring clause, of the schedule and of the Policy Period was misleading, so that the insured, as a reasonable man, could be presumed to have believed all legs of his trip would be covered - even the unscheduled, air taxi flight. (JA 33-34) Finally, the Court found that a warning was lacking to inform the insured that he would not be covered on unscheduled, commercial airline trips. (JA 34) Based upon these supposed ambiguities and upon his finding that appellant provided no duplicate of the policy to the insured, the District Court construed the policy liberally in favor of the insured's beneficiary (JA 32).

Appellant maintains that the green-letter warning is not in conflict with any portion of the policy and, therefore, causes no ambiguity. The warning alerts the insured that he is covered in his commercial airlines flights only when he travels on regularly scheduled airlines, viz., on

- (1)(a) a domestic, scheduled airline, flying interstate routes, which holds a Civil Aeronautics Board Certificate of Public Necessity and Convenience,
- (1)(b) a domestic, scheduled airline, flying intrastate routes, which is duly licensed by state authority, and
- (1)(c) a foreign, scheduled airline which is duly licensed to fly in the United States by its country's government.

This green-letter warning does not say that coverage is limited only to scheduled flights. The words read "scheduled airlines." So long as the flight is made on a scheduled airline, it is covered, whether the flight is regular, special or chartered.

Furthermore, the green-letter warning does not take away from the policy coverage what is given by the boldface heading and insuring clause, viz. coverage on other specified conveyances and coverage on the premises of an airport and in surface vehicles (as specified in

the policy). The warning reads " . . . airplane accidents on scheduled airlines." The warning does not read: "This policy is limited only to aircraft accidents. . ." Hence, the warning does not conflict with the broader coverage of the boldface heading and the insuring clause wherein coverage is extended to certain other injuries in airports and on surface transportation.

The nature of the green-letter warning is to clarify the policy coverage concerning commercial aircraft accidents. The warning does not pertain to flights on those other conveyances which are mentioned in part (1) (d), (e) and (f) of the insuring clause, because these conveyances cannot be considered "scheduled airlines" within the meaning of the policy. Also, as noted above, the warning does not concern airport accidents which may occur in the progress of an airtrip.

The warning is not all-inclusive. The District Court, by finding ambiguities in the policy, made the warning all-inclusive in plain disregard of the policy language.

The District Court erred in interpreting part (2) of the insuring clause, the Schedule and the Policy Period, to mean that coverage was provided for the entire trip from Tachikawa to Washington. As noted in Part A of this Argument, the issue in this appeal is not whether the entire trip was covered, but only whether the fatal flight was covered. Hence, the District Court exceeded the scope of the case by discussing the entire trip.

The insuring clause clearly sets forth the extent of coverage available to the insured; it reads:

The term 'injuries', . . . shall mean accidental bodily injuries received during any portion of the first one way or round trip which is made by the Insured, while this policy is in force, between the Point of Departure and the Destination designated in the Schedule and for which the Insured has purchased a transportation ticket or has been issued a pass; provided . . .
(Emphasis supplied)

By this clear language the insured was notified he was protected between the Point of Departure and the Destination only where he had

purchased a transportation ticket or had been issued a pass. Here, the insured had not secured full air passage from Tachikawa to Washington at the time this policy was written in Japan. He had his Travel Orders to return home. (JA 92-96) But these Travel Orders said nothing about an air taxi flight. At Tachikawa he had arranged only for passage to the west coast of the United States. He was not given a Government Transportation Request for a flight from San Francisco to Washington until he arrived at Travis. There, he secured the proper authorization from the base transportation officer (JA 105) and used it to book passage on United Air Lines through the E and J Travel Bureau (JA 104).

Hence, Mr. Messina was extended coverage by the policy only for those portions of his home flight for which he possessed a ticket at the time the policy was written (from Tachikawa to Travis Air Force Base) and for which he later obtained a Government Transportation Request (from San Francisco to Washington). He was not covered under part (2) of the insuring clause on the air taxi flight because he did not utilize a "surface vehicle for the purpose of . . . , continuing, . . . the airtrip designated in the Schedule." The insured made his inter-airport connection via a nonscheduled air taxi, which he must have known from the green-letter warning on page one of the policy was not encompassed within the coverage. Also, the insured did not travel on a special conveyance enumerated in the provisos of the insuring clause.

The Policy Period, set forth on page two of the policy, cannot be stretched to cover all legs of the Tachikawa-Washington flight. The policy period must be read together with the warning on page one and with the insuring clause on the same page of the policy. This Policy Period cannot be used to extend coverage where none was contemplated by the insuring clause. Since neither the warning nor the insuring clause provided coverage, appellee cannot find coverage in the Policy Period alone. If the Policy Period alone governed coverage, then all the words of the boldface heading, of the green-letter warning and of the insuring clause would be nugatory.

The District Court concluded that a clear warning should have been

given the insured " . . . that an intermediate air-taxi flight would not be covered in order to exempt the flight from Travis to San Francisco from the continuous coverage implied in the policy." (JA 34) The finding of the District Court that such a warning was "completely missing" was made in complete disregard of the green-letter warning appearing on page one of the policy. This warning was sufficient to apprise the insured that he would not be covered on a nonscheduled commercial airline flight. Moreover, the District Court held that, if a warning had been provided, he would have deemed it "ambiguous and obscure by the specific coverage extended to 'special' and 'chartered' flights." (JA 34) Appellant contends that a warning was provided and, for the reasons set forth above, cannot be considered "ambiguous and obscure" or in conflict with any provisions of the policy.

F. Lacking Ambiguities, the Insurance Policy Should Not Have Been Liberally Construed, But Should Have Been Applied According to the Tenor of Its Unambiguous Words.

Appellant submits that there are no ambiguities in this contract of insurance. Lacking ambiguities, the policy should not have been liberally construed against the appellant. As the United States Supreme Court (per HUGHES, C. J.) said in Williams v. Union Central Life Insurance Company, 291 U.S. 170, 54 S. Ct. 348, 78 L. Ed. 711, 92 A.L.R. 693, at 54 S. Ct. 352:

As there is no ambiguity in the provisions under consideration, there is no occasion for resort to the familiar principle that equivocal words should be construed against the insurer. While it is highly important that ambiguous clauses should not be permitted to serve as traps for policy-holders, it is equally important to the insured as well as to the insurer, that the provisions of insurance policies which are clearly and definitely set forth in appropriate language, and upon which the calculations of the company are based, should be maintained unimpaired by loose and ill-considered interpretations.

The three cases upon which the District Court heavily relied in finding ambiguities and resolving them against the appellant were

Smith v. Indemnity Co., 318 F.2d 266, 115 U.S. App. D.C. 295; Lachs v. Fidelity & Casualty Co., 306 N.Y. 357, 118 N.E.2d 555; and Steven v. Fidelity & Casualty Co., 58 Cal.2d 862, 27 Cal. Rptr. 172, 377 P.2d 284.

In Smith the widow-beneficiary of an insured brought an action against the insurer on an accident policy issued to her husband, a Savings Association League executive. The insured had been killed in an automobile collision near New Orleans, Louisiana, while he was driving a rental automobile to the New Orleans airport whence he was scheduled to depart by plane for Washington. This Court (2-1) held the insured's death in the automobile collision came within the policy's coverage which protected the insured against injury while on ". . . any land conveyance licensed for the transportation of passengers for hire while traveling directly to or from an airport immediately preceding departure . . ." in the course of his employer's business. BASTIAN, J., in a sharp dissent, argued that there were no ambiguities in the policy and that the insured had not died while a passenger on a conveyance covered by the policy.

The Smith case differs from the facts of this present appeal because there the Court was concerned only with the policy's coverage provided for the insured on surface vehicles traveling to or from an airport while the insured was pursuing his employer's business. Here, the fatal trip was on an air-taxi, not a surface vehicle. More important, however, is the fact that the type of conveyance herein is an air taxi of a non-scheduled airline for which no coverage provision whatever had been made in the policy.

In Lachs the insured purchased airtrip insurance from an airport vending machine located near the ticket counter for sales of non-scheduled flights. A small placard on the machine limited coverage to "any scheduled airline." Immediately upon purchasing the policy, the insured mailed it to her beneficiary. The nonscheduled airline plane on which she was travelling to Miami subsequently crashed, and she received fatal injuries. The New York Court of Appeals found an ambiguity "of the situation" from the fact that the vending machine had

been placed near the nonscheduled flight ticket counter, whereas the policies vended therefrom covered only scheduled airlines flights.

In Steven the insured also purchased his policy from an airport vending machine. The top portion of the policy, which contained a warning as to the amount and coverage for travel on "scheduled air carriers," was apparently concealed from his view before he bought the policy. He mailed the policy to his wife as he was instructed to do. Although his round-trip flight was booked on a scheduled airline, the insured was forced by bad weather in Terre Haute, Indiana, to make a connecting flight on a nonscheduled air taxi. The air taxi crashed, and the insured died from injuries received therein. The California Supreme Court (in bank) held a reasonable man in the insured's situation would have believed he was covered for the entire flight, even for the nonscheduled, connecting air taxi flight, because the policy was machine-vended, the exclusionary clause at the heading of the policy was apparently concealed from the insured's view, and the insured had mailed the policy to his beneficiary in an envelope provided by the machine according to instructions.

In Steven the California Court, noting that the machine-vended policy created an "unusual case," said at 27 Cal. Rptr. 181:

We do not deal here with the orthodox insurance policy sold in the protective aura of the insurer's explanation and discussion of its terms. The vending machine emitted a complex stereotyped document, which, because of the short time elapsing before the start of Mr. Steven's flight, hardly afforded him an opportunity even to read the policy.

The Court concluded its decision with the statement: "We must view the instant claim in the composite of its special and unique circumstances."

Here, unlike in Lachs and Steven, the policy was not machine-vended; hence, no unusual situation was created. The policy was purchased from the appellant's sales agent at Tachikawa Air Force Base in Japan (JA 44, 89). Appellee did not adduce any evidence to show that, as in Steven, the insured had no opportunity to read his policy or

to discuss the nature of its coverage with appellant's agent. On the contrary, it may have been that Mr. Messina actually questioned appellant's agent about the extent of the policy's coverage, was warned by the sales agent that the policy did not cover flights on nonscheduled commercial airplanes, and was told by the sales agent that additional coverage was available at a higher premium for nonscheduled airlines flights. At least, Mr. Messina would have had an opportunity to discuss his coverage with appellant's sales agent who had sold him the policy, whereas the deceased insureds in Lachs and Steven had no such opportunity because their policies were machine-vended.

There was no showing by appellee that, as in Steven, an emergency compelled the insured to use the nonscheduled air taxi. Appellee proffered no evidence that government business or family necessity prompted the air taxi flight. Appellee's own witness made it clear that there were several other modes of transportation available to Mr. Messina for his trip from Travis to San Francisco International Airport, stating that air-taxi service at Air Force Bases was initiated merely to facilitate and expedite the transportation of large numbers of persons to nearby commercial airports. (JA 61) Appellee failed to show emergency circumstances which would bring her within the purview of the Steven decision. By failing to establish the existence of an emergency, she neglected to establish an essential fact necessary for the application of Steven. Throughout the trial appellee did not bear the burden of proving that her husband's accidental death came within the policy's coverage. Fairclough v. Fidelity & Casualty Co., 54 App. D.C. 286, 297 F. 681.

In both Steven and Lachs the insured mailed the policy to the beneficiary in conformity with the insurer's mailing recommendation. Here, there was no evidence introduced by appellee that the insured was induced by appellant's sales agent to mail the policy to his wife. There is no statement in the policy itself urging mailing. There was no showing by appellee that appellant's sales agent did anything to facilitate mailing, even to furnish a stamp. Although the policy was issued in a self-mailing form, it cannot be concluded from this fact alone that appellant's sales agent urged the insured to mail the policy.

At trial appellee did not bring up the point about whether appellant had furnished Mr. Messina with a duplicate copy of his policy. The first mention of lack of a duplicate occurred in appellee's Memorandum Brief. There, appellee alleged no duplicate had been provided. Notwithstanding appellee's failure to prove lack of a duplicate by evidence at trial, the District Court ruled in appellee's favor on this point and concluded: "The company provided no duplicate" (JA 34) This conjectural conclusion was clearly erroneous because it was unsupported by probative evidence. The burden of showing lack of a duplicate remained upon the appellee throughout trial. She could not shift this burden by alleging, as she did in her Memorandum Brief, that the existence vel non of a duplicate copy of the Messina policy was within appellant's knowledge. By neglecting to establish lack of a duplicate, appellee failed again to bear the burden of proving her case by a preponderance of evidence. See Fairclough v. Fidelity & Casualty Co., supra.

In Steven the California Supreme Court applied the products liability warning requirement to contracts of insurance and required insurance companies, vending their policies through mechanical means, to give adequate warning of non-coverage to prospective purchasers. The New York Court of Appeals had set forth a similar, mandatory warning requirement for machine-vended insurance policies in the Lachs case. In Steven an adequate warning had not been given to the policyholder; in Lachs the warning had appeared on a sign attached to the vending-machine, not on the policy.

Since the present appeal does not concern a machine-vended policy, the rationale of the Lachs and Steven cases is inapplicable. But the warning on the present policy would even satisfy fully the requirement of Lachs and Steven. The present warning, apprising Mr. Messina of non-coverage on nonscheduled, commercial airline flights, appeared in boldface, contrasting type on page one of the policy itself. The District Court erred in concluding that a Lachs-Steven-type warning was lacking in the present policy. (JA 33, 34)

Another distinction between Lachs and Steven and the instant case concerns the origin of the fatal flight. While in all three instances the insured himself purchased the fatal flight, in both Lachs and Steven the fatal flight was planned by the airline: in Lachs the fatal flight was the original service purchased by the insured; in Steven the fatal flight had been substituted for the original service, which had been rescheduled due to weather conditions, at the suggestion of the airline who facilitated the insured's air taxi trip. But here neither the air carrier upon which Mr. Messina flew from Tachikawa to Travis nor United Air Lines (which was scheduled to fly him from San Francisco to Washington) facilitated or knew anything about the air taxi flight. The Piper-Apache trip was arranged by the insured independently of any airline and of MATS. The reasoning of Lachs and Steven is inapplicable on the facts of this case because in Lachs and Steven the original airline upon which the insured was flying either planned or facilitated the fatal flight, whereas here neither the overseas airline nor United knew anything or did anything about the fatal flight. Hence, the fatal flight taken by Mr. Messina cannot be considered a continuation of his trip from Tachikawa to Travis or from San Francisco to Washington.

Because the Smith, Steven and Lachs decisions are inapposite in this appeal, the District Court erred in relying upon these cases to find ambiguities in the present insurance policy.

There are many cases in the reports which stress the rule that a court must not twist an insurance policy to find ambiguities therein. The United States Supreme Court in Williams v. Union Central Life Ins. Co., *supra*, found that an insured was not entitled to a jury verdict where the express terms of a "participating" life policy did not warrant a current dividend to be applied in reduction of a cash loan advanced against the policy. In National Life Ins. Co. of United States v. Fleming, et al., 127 Md. 179, 96 A.281, the Maryland Court of Appeals examined language in an accident policy which provided coverage while "... riding as a passenger in a place regularly provided for the transportation of passengers, within a surface, underground or elevated railroad car" Finding the insured was killed while alight-

ing from a Los Angeles streetcar, the Court held there was no ambiguity in this language, the insured did not die while riding as a streetcar passenger and the insurer's first prayer should have been granted. The Maryland Court noted at 96 A. 284:

The language of the policy with which we are now concerned . . . is too clear and free from ambiguity to admit of any doubt as to the intention of the parties, and should not therefore be construed to include risks clearly excluded by the terms of the contract.

Similarly, in Mitchell v. German Commercial Acc. Ins. Co., 179 Mo. App. 1, 161 S.W. 362, where the insured was injured while boarding a streetcar, the Missouri Court held he had not been injured while riding as a passenger, saying at 161 S.W. 363-4:

The courts are not authorized to seize upon certain and definite covenants, expressed in plain English, with violent hands, and distort them so as to include a risk clearly excluded by the insurance contract.

In Mutual Benefit Health & Accident Ass'n v. Kennedy, 140 F.2d 24, the Fifth Circuit Court of Appeals held summary judgment for the insurer should have been entered where the unequivocal language of the policy informed the insured that the policy would lapse if his premium were paid by a certain date but the insured drowned before paying the premium. In Lincoln Nat. Life Ins. Co. v. Ghio, 111 F.2d 307, the Eighth Circuit Court of Appeals affirmed a declaratory judgment where the policy's language clearly required the insured to furnish proof of disability before reaching age sixty as a condition precedent to the insurer's liability.

In the area of airtrip coverage, the courts have required strict compliance with policy provisions. In Thompson v. Fidelity & Casualty Co., 16 Ill. App.2d 159, 148 N.E. 2d 9, cert. den. 358 U.S. 837, 79 S. Ct. 62, 3 L. Ed. 2d 74, the words "scheduled air carrier" were interpreted to exclude coverage where the insured died in the crash of an irregular air carrier. In McBride v. Prudential Ins. Co., 147 Ohio St. 461, 72 N.E. 2d 98, fatal injuries suffered in the crash of an aircraft hired for a hunting trip were not included within a policy

which covered only a "regularly scheduled flight of a commercial aircraft." In Thomas v. Continental Casualty Co., 225 F.2d 798, the beneficiary of an airtrip policy was not permitted to recover where the insured, who had departed for San Salvador on a round-trip ticket with an open-end return, died in San Salvador while he was a passenger on a private aircraft which collided in flight with a regularly scheduled commercial carrier. And in Mutual Benefit Health and Accident Ass'n v. Brunke, 276 F.2d 53, the insured's loss of an airtrip policy, without having had an opportunity to read it, was held not to absolve him from the policy provisions respecting timely notice and suit where he claimed injuries arising out of collision between the taxicab, arranged by the airline to take him to the airport, in which he was riding and another vehicle.

G. Certain Conclusions of the District Court Were Based Upon Inadmissible Items of Evidence.

For several of the conclusions found in its Memorandum, the District Court relied upon items of evidence, introduced by appellee, which were inadmissible under the Federal Shop Book Rule because they constituted opinions of absent parties. Appellant's timely objections to these items, although not passed upon immediately by the Court, were overruled in the Court's Memorandum. (JA 34) Appellant maintains that these items, received into evidence over its objections, were improperly admitted and were relied upon by the Court in writing his opinion.

Although it disavowed doing so, the District Court partially bot-tomed its conclusion that the air taxi trip was part of a continuous, authorized flight from Tachikawa to Washington, upon "(t)he fact that the Army considered Mr. Messina to be in 'duty status' until his arrival at Brentwood, Maryland" (JA 34). This conclusion was fortified by the Court's determination " . . . supported by regulations offered in evidence by plaintiff, that Mr. Messina could have been reimbursed for the air-taxi flight out of Army funds." (JA 34)

The appellant has already demonstrated (in Part A of this Argument) that the Army regulations, proffered by appellee at the sugges-

tion of the Court (JA 69) and received by the Court over appellant's objection (JA 77), do not conclusively establish that Mr. Messina would have been entitled to reimbursement for the air taxi fare if he had lived, because reimbursement was discretionary, the air taxi trip had not been authorized by the insured's Travel Orders or Government Transportation Request, and the regulations dealt with surface "taxi-cabs," not with air taxis. The appellant will now show that the Court's finding of "duty status" was erroneous since it rested upon inadmissible evidence.

The Court's determination of "duty status" is traceable to the testimony of witness Wilfred J. Harren at trial and to two exhibits (No. 2 and 3) introduced into evidence by appellee while Mr. Harren, a program analyst with the Labor Department's Bureau of Employees Compensation, occupied the witness stand. (JA 48) Appellee's Exhibit No. 2 comprised two documents from the Department of Labor File No. x-1298188 of the insured; Exhibit No. 3 constituted the insured's Travel Orders from Seoul, Korea, dated December 29, 1959. Appellant entered timely objections that a portion of the document comprising Exhibit No. 2A contained an opinion of an absent party and was, therefore, inadmissible under the Federal Shop Book Rule, 28 U.S.C. 1732. New York Life Insurance Co. v. Taylor, 79 U.S. App. D.C. 66, 147 F.2d 297. (JA 47-48) Notwithstanding appellant's objections, Mr. Harren was permitted by the Court to rely upon Exhibit No. 2A, along with Exhibit No. 3, for his statement that Mr. Messina was on "duty status" at the time of his death. (JA 49) Appellant had not objected to the introduction of the Travel Orders constituting Exhibit No. 3. (JA 50) However, the witness admitted he could make no determination of "duty status" from the Travel Orders alone; (JA 50-51) and that he did not have all the documents in court which he needed for a definitive answer to the Court's query concerning Mr. Messina's "duty status." (JA 51) The final posture of witness Harren's testimony was that he needed other documents upon which to base his statements about the insured's "duty status."

Clearly, the document comprising Exhibit No. 2A was inadmissible to show "duty status" because it contained an opinion of an absent

person which, under the Federal Shop Book Rule, could not be introduced into evidence. New York Life Ins. Co. v. Taylor, supra. The District Court's reliance upon Mr. Harren's testimony, which was based upon the inadmissible opinion contained in Exhibit No. 2A and upon other documents which the witness did not have in court, was erroneous.

For his conclusion "that MATS received a benefit from granting the Air Taxi Service the right to operate between Travis and San Francisco Airport," (JA 37) thereby showing consideration for the supposed contract between the air taxi company and MATS, the District Court relied upon appellee's Exhibit No. 7 (Colonel Stark's letter of February 2, 1959, requesting permission from WESTAF to begin negotiations for an air taxi service at Travis). This Exhibit comprised both factual data and a statement concerning the adequacy of existing, daytime, surface transportation at Travis at that time. Appellant objected to this statement but not to the factual data, on the ground that Colonel Stark was not present in court for cross-examination. (JA 60) The District Court held " . . . this factual data speaks for itself" (JA 37)

The precise opinion statement objected to reads: "The existing surface transportation services at Travis Air Force Base are not considered adequate to meet the demands of present day travel requirements." (Emphasis supplied.) This statement of Colonel Stark not only sounds like the opinion of another person but, when read in context with the many references therein to his Transportation Officer, it becomes apparent that Colonel Stark's opinion concerning the inadequacy of daytime surface transportation on or about February 2, 1959, a year before the occurrence complained of, was not necessarily his own. Cross-examination on this likely hearsay opinion might have revealed that the consideration of the subject was not without considerable dissent.

Appellant maintains the District Court must have been influenced by the inadmissible opinion contained in Exhibit No. 7. The Court found that a benefit to MATS flowed from the revocable permit. (JA

36) Such a benefit could be founded only upon the alleged present inadequacy of existing, daytime surface transportation at Travis — which was Colonel Stark's conclusion in his letter to WESTAF. Appellant submits that Colonel Stark's opinion was part and parcel of the District Court's finding. By relying upon the opinion of a person absent from court for cross-examination, the District Court exceeded the permissible bounds of the Federal Shop Book Rule.

A leading case authority in this jurisdiction, New York Life Ins. Co. v. Taylor, *supra*, reveals this Court as observing that the Supreme Court in Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645, 144 A.L.R. 719, limited the admission of records under the Federal Shop Book Rule to routine facts, such as names and dates, not a narrative report of an event as a substitute for oral testimony.

In a subsequent decision on this same subject, this Court in Lyles v. United States, 103 U.S. App. D.C. 22, 254 F.2d 725, *cert. den.* 356 U.S. 961, 78 S.Ct. 997, 2 L.Ed. 2d 1067, held that the naked record of an opinion on a complex matter without the speaker being present, and with no opportunity to cross-examine as to the foundation for the opinion, is plainly not warranted by the language or the history of the Federal Shop Book Act. The line of demarcation was described therein as "the distinction between the reasonable reliability of recorded facts on the one hand, and controversial technical opinions on the other." The reason was given thus at 103 U.S. App. D.C. 28:

A fact can be testified to by any witness, but, with few exceptions, an opinion can be given in evidence only by an expert, and the qualifications as an expert for his opinion are part of the premise for allowing him to testify.

Even if the said exhibit were admissible, the District Court committed reversible error taking it into account. The conditions referred to in the exhibit were not only those which allegedly existed a year before, but which allegedly existed in the daytime. The

former conditions might well have been remedied on the date of the fatal flight and the alleged inadequacy of surface transportation in the daytime might well have not existed at night. Mr. Messina's death was not shown to have occurred during the daytime. In fact, it is apparent from the Transcript that his death occurred after dark on the winter night of January 25, 1960. That is the date on which Mr. Messina bought his policy in Japan, on which he arrived at Travis, and on which he died.

ARGUMENT TWO

APPELLEE WAS NOT ENTITLED TO AN AWARD OF INTEREST AT SIX PER CENTUM PER ANNUM SINCE MARCH 16, 1960

The District Court appended to his judgment for appellee in the face amount of the policy an award of statutory interest from March 16, 1960, the date on which appellant mailed written notice of rejection of appellee's claim. (JA 38) The Court felt that interest was justified by Title 28, Section 2707, District of Columbia Code (1961 ed.), which reads as follows:

In an action in the United States District Court for the District of Columbia to recover a liquidated debt on which interest is payable by contract or by law or usage the judgment for the plaintiff shall include interest on the principal debt from the time when it was due and payable, at the rate fixed by the contract, if any, until paid.

The Court decided "the face amount of the policy is a liquidated amount, and . . . interest is payable by law or usage. . . ." (JA 38) The Court rejected appellant's argument that, if any interest was available, the award would have to be based upon D.C. Code 28-2708 and would be discretionary. But the Court noted that, if interest under D.C. Code 28-2708 were applicable, he would have made the award anyway "since it is necessary 'to fully compensate the plaintiff' for the amount which the proceeds could have earned since the time when such proceeds were due and payable." (JA 39)

Appellant urges this Court to reverse the District Court's award of interest for two reasons:

- (1) the District Court erred in applying D.C. Code 28-2707, since any award of interest would be sanctioned only by D.C. Code 28-2708 and then only in the discretion of the Court; and
- (2) under D.C. Code 28-2708 the appellee, on these facts, would not merit discretionary interest.

Appellant submits that appellee sought interest as a part of compensatory damages, not as a sum awarded on a liquidated debt. No particular Code section upon which appellee relied for her interest was cited in her Complaint or Pretrial Statement. Appellee first disclosed her reliance upon D.C. Code 28-2707 in her Trial Brief. She buttressed her claim for interest under this section with the following citations: Royal Indemnity Company v. Woodbury Granite Co., 69 App. D.C. 364, 369, 101 F.2d 689 (dictum); Rosden v. Leuthold, 107 U.S. App. D.C. 89, 274 F.2d 474; and Blustein v. Eugene Sobel Company, 105 U.S. App. D.C. 32, 263 F.2d 478.

Royal Indemnity concerned a subcontractor's suit under the Heard Act. This Court allowed interest against the surety on a contractor's statutory bond but reduced the amount thereof because formal demand for payment had not been made prior to institution of the action.

Rosden was an action on three unpaid bills of exchange. Plaintiff, in addition to seeking the total amount of these bills, prayed for interest from the date they fell due, plus reasonable attorney's fees and costs. Defendant denied liability and counterclaimed for a separate sum plus interest and costs. The District Court awarded plaintiff attorney's fees and interest from the date of judgment. Judgment on the defendant's counterclaim was entered with interest thereon. This Court reversed, saying that, absent statutory provision or agreement between the parties, attorney's fees were not allowable. Furthermore, this Court felt that custom and usage warranted an award of interest from the date of demand and refusal of payment.

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Blustein involved suit for breach of warranty resulting from inaccurate statements of corporate income tax liability, a tax deficiency being due at the time plaintiff purchased Blustein Company. Plaintiff sought interest on the loss occasioned by the breach. Held: since the amount due could be determined by mathematical computation, the sum was liquidated and interest was payable thereon.

An examination of these cases reveals they are inapplicable on the facts of the present appeal. The dictum in Royal Indemnity is not authority for awarding interest against appellant, an insurance company which has, bona fide, contested a policy claim it believes untenable. In Rosden and Bluestein law and usage permitted interest: Rosden was an action on bills of exchange; Blustein was a suit for breach of warranty. In the present controversy an insurance policy - not bills of exchange or warranties - is under scrutiny. Law and usage may have merited an award of interest in these two cases, but law and usage do not favor appellee here. The District Court's reliance upon Appelman, Insurance Law and Practice §§ 1581-1584 (1941 ed.), as authority for awarding interest based upon law and usage, was misplaced. Those textual sections merely catalogue decisions from other jurisdictions in which interest was allowed at various times preceding judgment. No local cases were cited; and no discussion of applicable D.C. Code provisions was given. Moreover, the District Court erred in applying interest against appellant, an insurance company, under D.C. Code 28-2707 on the authority of Blustein which is inapplicable on these facts.

D. C. Code 28-2707 authorizes interest where payable by the terms of a contract or by law or usage. As already indicated, law or usage do not provide for interest on the facts of this appeal. The policy itself does not specify interest. For these reasons, the above-mentioned Code section is inapplicable.

Appellant claims appellee has sought discretionary interest as part of her compensatory damages under D.C. Code 28-2708, notwithstanding appellee's reliance upon D.C. Code 28-2707. On the authority of Redfield v. Ystalyfera Iron Co., 110 U.S. 174, 3 S.Ct. 570, 28 L.Ed. 109, appellant argues that interest recoverable as an element of com-

pensatory damages rests within the discretion of the trial court. This Redfield rule is expressed in D.C. Code 28-2708 and has been applied in Flanagan v. Charles H. Tomkins Co., 86 U.S. App. D.C. 307, 182 F.2d 92, where this Court held the Code provision vests broad discretion in the trial court, sitting without a jury, to award or deny interest.

On this record appellee under D.C. Code 28-2708 is not entitled to discretionary interest from the date of the demand and refusal. Appellant has not been accused of unjust, oppressive or vexatious delay in preventing appellee from pursuing timely prosecution of her suit. Delay has not been occasioned by appellant's use of procedures authorized by the Federal Rules of Civil Procedure. Any delay in this case springs from appellee herself. In her complaint, filed eight months after the rejection of her claim, she requested a jury trial, thereby delaying the case from being heard for nearly another two years; but on the day of trial she withdrew her demand, conceded the suit presented no factual questions and asked for a hearing by the Court without a jury, which could have been reached much sooner. As a result of this pointless delay, appellant is now assessed nearly six thousand dollars (\$6,000) in additional interest.

Appellee has asserted that the revocable permit constituted a contract binding MATS and Travis Air Taxi Service. But appellant took the initiative to bring out the necessary facts concerning the nature of this document, e.g., taking the deposition on written interrogatories of Major Lichty, USAF (Transportation Officer at Travis), Mr. Jamieson (the air taxi's president), and Lt. Gen. Joe Kelly, USAF (MATS commander). Questions submitted to these out-of-town witnesses were objected to by appellee who moved for an order requiring their depositions to be taken orally; this motion, filed in early June, 1961, was not reached and overruled until November, 1961, occasioning a delay of nearly five months.

Because delay in prosecution of this case was occasioned by the appellee herself, she should not be allowed interest from the date of the demand and refusal, March 16, 1960.

CONCLUSION

The late husband of the appellee, a civilian employee of the Corps of Engineers whose employment in Korea had been terminated, returning to his home in Brentwood, Maryland, purchased the accident insurance policy sued on in Japan from a sales agent of the appellant insurance association at a time when he was ticketed merely for a flight to Travis Air Force Base, California. Instead of buying a policy which would cover non-scheduled flights as well as scheduled flights, he chose to buy a policy for \$4 which provided \$50,000 coverage on six expressly described flights.

We are not dealing here with an exclusion in a policy which first tells the buyer what he is getting and then, later on, states what might be taken away. The policy in controversy had stamped prominently on its first page a glaring warning: "READ CAREFULLY: THIS POLICY IS LIMITED: TO AIRCRAFT ACCIDENTS: ON SCHEDULED AIRLINES!"

Upon arriving at Travis Air Force Base, instead of taking one of the other modes of surface transportation which were available to him, Mr. Messina chose, of his own volition and at his own expense, to purchase an air taxi flight on a private, unscheduled air carrier which later crashed.

An expressly covered flight in the insured's policy was one "operated by, or contracted for by," MATS, a command of the United States Air Force, which was charged with transporting men and materials to strategic points throughout the world for the Air Force. Appellee freely conceded in interrogatories put to her that the deceased had not

been a passenger on any of the scheduled airlines; appellee asserted that the flight on which her husband lost his life was one "contracted for by" MATS.

Appellee then described a "revocable permit" issued by the Travis Air Force Base commander to the air taxi company, allowing the air taxi company to bring passengers into the base and to sell flights from the base. She alleged that this "revocable permit" was a contract between MATS and the air taxi company and, therefore, the air taxi flight on which insured perished was a flight contracted for by MATS.

Obviously, MATS was not privy to the fatal flight, which decedent contracted for personally and of his own free choice with the private carrier. A review of the essential elements of a contract make it very clear that the instrument expressly denominated a "revocable permit" did not constitute a valid contract. The parties did not bind themselves to do anything legally enforceable. It was terminable at will. The licensee paid nothing for the privilege of doing business at Travis Air Force Base. The base commander laid down certain requirements as a condition precedent to the issuance of the permit, but he maintained no control over individuals performing their duties for the licensee or over the individual pieces of equipment used by them.

Even if this instrument did not fatally lack the necessary element of mutuality it would fail of validity for lack of the base commander's authority to bind MATS in contract for such a flight. No express authority had been given him for this purpose and, as has been shown, there is no such thing in government contract law as implied power in a government agent to bind his principal.

The appellee has utterly failed to sustain her burden of proof with respect to her right to recover under Japanese law, and her assertion that the revocable permit was a contract. All this is academic, how-

ever, because even if the "permit" were to be construed as a contract, it would still not transform Mr. Messina's contract with the air taxi company into a flight, the object of their so-called contract, "contracted for by" MATS.

The policy sued on could not describe the coverage provided in clearer English, and appellee has not pointed to one word or phrase therein with which an ordinary person would not be reasonably familiar or which could reasonably be given two or more meanings. There being no ambiguity, there is no justification for resort to rules of construction.

Following the admonition of the framers of the new Federal Rules of Civil Procedure, in order to narrow the issues and to cut down trial time, appellant obtained appellee's admission that she pitched her case solely on the issue of the fatal flight being one contracted for by MATS due to the "revocable permit" being a contract. At trial, appellee was improperly permitted to introduce testimony and exhibits that were irrelevant and obscurant to one proper issue: namely, was the air taxi flight, purchased by the deceased, one covered by the policy?

Despite all this the plaintiff-appellee failed to make a prima facie case against the appellant and the District Court erred in denying appellant's motion at the close of the appellee's case for dismissal. Appellant maintains that, for the reasons set forth in this brief, the District Court's verdict for appellee was contrary to established law and to the evidence. Although appellant does not expect this Court to reach the issue of interest, interest should not be available here to appellee under D.C. Code 28-2707 which is inapplicable or under 28-2708 because on these facts appellee does not merit discretionary interest as part of compensatory damages. Appellant now requests this Court to reverse the judgment of the District Court and to issue a mandate ordering judgment to be entered for appellant with costs of this appeal and with costs in the Court below.

Respectfully submitted,

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532 Munsey Building
Washington, D. C. 20004

Attorney for Appellant

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JOINT APPENDIX

[Filed November 15, 1960]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MRS. JOSEPHINE L. MESSINA
5605 Patterson Road
Riverdale Heights, Maryland

Plaintiff,

v.

Civil Action No. 3776-60

MUTUAL BENEFIT HEALTH &
ACCIDENT ASSOCIATION
Ring Building
Washington, D.C.

Serve: SUPERINTENDENT OF INSURANCE
1145-19th Street, N.W.
Washington, D.C.

Defendant

COMPLAINT

(For Proceeds of Insurance Policy)

1. This court has jurisdiction hereof by virtue of Title 11, Section 306, District of Columbia Code (1951); and by virtue of Title 28, Section 1332, United States Code. The amount in controversy exceeds the sum of Ten Thousand Dollars (\$10,000.00) exclusive of interest and costs.

2. The plaintiff is now and was at all times hereinafter mentioned a citizen of the United States and a resident of the State of Maryland.

3. The defendant is now and was at all times hereinafter

2
Complaint

mentioned a corporation organized and existing under the laws of the State of Nebraska and doing business in the District of Columbia.

4. On or about the 25th day of January, 1960, the defendant sold to one Salvatore H. Messina a policy of life insurance numbered 18228A, with a face amount of Fifty Thousand Dollars (\$50,000.00) under the terms of which the defendant insured the said Salvatore H. Messina against loss of life resulting independently of all other causes from injuries received during any portion of a trip by air from Tachikawa Air Force Base, Japan, to Washington, D.C., for which flight the said Salvatore H. Messina had purchased a transportation ticket or had been issued a pass.

5. On or about the 25th day of January, 1960, at a time when the said insurance policy was in full force and effect, and at a time when the said Salvatore H. Messina was en route by air from Tachikawa Air Force Base, Japan, to Washington, D.C., the said Salvatore H. Messina died from injuries received in the crash of an aircraft in which he was then a passenger.

6. The defendant has failed and refused to pay to the plaintiff as the beneficiary in the said policy the proceeds of the said policy despite demand for the same and despite compliance by the plaintiff with all conditions precedent to her right to demand payment of the said proceeds.

WHEREOF, the premises considered, the plaintiff demands judgment against the defendant in the sum of Fifty Thousand Dollars (\$50,000.00) plus interest and the costs of this suit.

JACKSON, GRAY & JACKSON

**Plaintiff Demands a
Trial by Jury**

/s/ Darryl L. Wyland
719 - 15th Street, N.W.
Washington, D.C.
Counsel for Plaintiff

[Filed December 3, 1960]

ANSWER

First Defense

The complaint fails to state a cause of action upon which relief may be granted.

Second Defense

1, 2 & 3. The defendant admits the allegations contained in paragraphs 1, 2 & 3 of the complaint.

4. The defendant denies the allegations contained in paragraph 4 of the complaint which asserts that the defendant sold to one Salvatore H. Messina a policy of life insurance insuring him against loss of life from injuries received during any portion of a trip by air from Tachikawa Air Force Base, Japan, to Washington, D.C. The remaining allegations are admitted.

5. The allegations contained in paragraph 5 of the complaint asserting that the insured died from injuries received in an aircraft which crashed at a time when the said insurance policy was in full force and effect is denied.

6. The allegations contained in paragraph 6 of the complaint asserting that the plaintiff has complied with all conditions precedent to her right to demand payment is denied.

Third Defense

The insurance coverage under the policy sued on was subject to the express proviso that the insured's loss of life result from injuries received "(1) while riding as a passenger in an aircraft operated on a regular, special or chartered flight (a) by a scheduled air line of United States Registry holding a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics

Board of United States of America or its successors, (b) by an intrastate scheduled airline of United States Registry maintaining regular published schedules and licensed for the transportation of passengers by a duly constituted authority having jurisdiction over civil aviation in the state in which said airline operates (or) (d) by, or contracted for by, the Military Air Transport Service (MATS) of the United States", none of which requirements is met with the circumstances under which the insured herein incurred his fatal injuries.

WHEREFORE, having fully answered, defendant demands dismissal of the complaint with the costs by it incurred.

KELLY, KEATING AND LEAHY

/s/ John Joseph Leahy
Attorneys for Defendant
532 Munsey Building
Washington 4, D.C.

[Certificate of Service, December 2, 1960]

[Filed, December 14, 1960]

INTERROGATORIES PROPOUNDED BY
DEFENDANT TO PLAINTIFF

To: Jackson, Gray & Jackson
719 Fifteenth Street, N.W.
Washington 5, D.C.
Attorneys for Plaintiff

Defendant propounds to the plaintiff pursuant to Rule 33, FRCP, the following interrogatories relating to the issues of this action, to

Interrogatories Defendant to Plaintiff

be answered separately and fully in writing under oath within fifteen (15) days following service of same:

1. State the terms and conditions of the insurance policy upon which the suit is brought by filing as an exhibit a fac-simile copy of said policy.

2. State the place where the insured met his death, the name of the carrier operating the flight on which said death occurred, point of departure of said flight, the intended point of destination of said flight, and the type of flight involved, i.e., whether it was an air taxi service.

3. State whether or not the carrier named in answer to Question 2 above was a scheduled airline of United States Registry holding a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board of United States of America or its successors.

4. State whether or not the carrier named in answer to Question No. 2 above was an intrastate scheduled air line of United States Registry maintaining regular published schedules and licensed for the transportation of passengers by a duly constituted authority having jurisdiction over civil aviation in the state in which said air line operates.

5. State whether or not the flight on which the insured's death occurred was by, or contracted for by, the Military Air Transport Service (MATs) of the United States.

6. State the manner in which the insured was authorized to return to Brentwood, Maryland, from Seoul, Korea, on 29 December 1959, by filing as an exhibit a fac-simile copy of the travel orders issued to the insured by his employer.

7. State whether or not the insured paid cash for his proposed flight from San Francisco to Washington, D.C., on 25 January 1960 via United Air Lines, Inc.

8. State whether or not the insured paid cash for his ill-fated proposed flight from Travis Air Force Base to San Francisco

Interrogatories Defendant to Plaintiff

International Airport on 25 January 1960 via Travis Air Taxi
(Golden Gate Airways).

KELLY, KEATING AND LEAHY

/s/ John Joseph Leahy

[Certificate of Service, December 9, 1960]

[Filed, January 11, 1961]

ANSWERS TO INTERROGATORIES

1. See attached copy.
2. The insured lost his life while enroute from Tachikawa Air Force Base, Japan (called "TAW" in the policy) to Washington, D.C. on the 25th day of January, 1960, while in the course of being taxied from Travis Air Force Base, California, to San Francisco International Airport, San Francisco, California, via Travis Air Taxi Service, a usual and normal connection between flights of the Military Air Transport Service and commercial flights departing from San Francisco International Airport. Travis Air Taxi Service was, on the date of the fatal flight, the holder of an Air Taxi Operator's Certificate issued by the Civil Aeronautics Board.
3. The particular plane in which the insured was a passenger at the time of his death was not operated by a scheduled air line of United States registry holding a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board.
4. The particular plane in which the insured was a passenger at the time of his death was not operated by an intrastate scheduled airline of United States Registry maintaining regular published

7
Answers to Interrogatories

schedules and licensed for the transportation of passengers by a duly constituted state authority.

- 5. Yes.
- 6. See attached copy.
- 7. I assume he did not.
- 8. I do not know.

/s/ JOSEPHINE L. MESSINA,
Plaintiff

STATE OF MARYLAND
COUNTY OF PRINCE GEORGES

ss:

JOSEPHINE L. MESSINA, being first duly sworn on oath deposes and says that she has read the foregoing Answers by her subscribed and that they are true to the best of her knowledge, information and belief.

/s/ JOSEPHINE L. MESSINA

Subscribed and sworn to before me this 10th day of January, 1961.

/s/ Edna N. Gronhalm
NOTARY PUBLIC

My Commission expires: 5/1/61

[Certificate of Service, January 11, 1961]

[Filed, June 8, 1961]

**MOTION TO COMPEL DEPOSITION TO BE TAKEN
UPON ORAL INTERROGATORIES**

Comes now the plaintiff, through counsel, and moves this Honorable Court for an order compelling the deposition of WILLIAM

Motion to Compel Deposition Upon Oral Interrogatories

S. JAMIESON, President, E & J Travel Bureau, Inc., 715 Marin Street, Vallejo, California, to be taken upon oral interrogatories, and for grounds in support thereof invites the attention of the Court to the Affidavit of counsel annexed hereto and made a part hereof.

JACKSON, GRAY & JACKSON

/s/ Darryl L. Wyland

[Certificate of Service, June 7, 1961]

[Filed, June 8, 1961]

AFFIDAVIT

DISTRICT OF COLUMBIA, SS.:

DARRYL L. WYLAND, being first duly sworn on oath, deposes and says:

1. That he is one of the attorneys for the plaintiff in this case, and has personal knowledge of the facts hereinafter set forth.
2. That he has conducted a long and comprehensive investigation of the facts bearing upon the issues in this case, and has found that all of the witnesses whose testimony is necessary to the plaintiff (and to the defendant, also), with the possible exception of one (1) local witness, are located in and near San Francisco, California; and that a substantial amount of very relevant evidence is in the form of documents and correspondence in corporate and government files in Vallejo and Fairfield, California.
3. That the affiant verily believes, on the basis of personal conversations with other officers of the corporation of which the witness is president, that the witness whose deposition upon written interrogatories has been noticed by the defendant has, and has access

Affidavit of Darryl L. Wyland

to, information in addition to that sought by the defendant's interrogatories which will constitute evidence bearing upon the issues in this case, or will lead to other sources of evidence, and that much of that evidence will be in documentary form.

4. That the testimony of the said witness, and that of other witnesses in that area, will constitute the substantial part of the evidence of both parties in this case; the significance of this deposition is, in the judgment of the affiant, of such magnitude that a full and thorough examination which only an oral deposition will permit is both justified and essential.

/s/ Darryl L. Wyland

Subscribed and sworn to before me this 7th day of June, 1961.

/s/ Zoe M. Shea,
Notary Public, D.C.

[SEAL]

My commission expires: Feb. 14, 1965

[Filed, June 9, 1961]

**NOTICE OF DEFENDANT REGARDING THE TAKING OF WITNESS
WILLIAM S. JAMIESON'S DEPOSITION**

To: Jackson, Gray & Jackson
719 Fifteenth Street, N.W.
Washington 5, D.C.
Attorneys for Plaintiff

Please take notice that the defendant, Mutual Benefit Health and Accident Association, proposes the following interrogatories to be

propounded to Mr. William S. Jamieson, Pres., E & J Travel Bureau, Inc., 715 Marin Street, Vallejo, California, by Mrs. Barbara L. Scott, a Notary Public, 902 Marin Street, Vallejo, California, on behalf of the defendant:

1. You are William S. Jamieson, President of the E & J Travel Bureau, Inc., a body corporate, with its principal offices located at 715 Marin Street, Vallejo, California?

2. On February 29, 1959, were you the President of the Travis Transportation Company, Incorporated, "doing business as Golden Gate Airways," successor and assignee of the Travis Air Taxi Service, a body corporate?

3. On January 25, 1960, was the said Travis Transportation Company doing business in the same name and style, and were you its President?

4. At that time was the said Travis Transportation Company engaged in the commercial taxiing of passengers to and from Travis Air Force Base and San Francisco International Airport, California, air flight as a public carrier?

5. If the answer to Question 4 above is "yes", was such activity under contract with the United States Military Air Transport Service (MATS)?

6. Can you and did you append to your answers to these interrogatories a photostatic or thermofaxed copy of the instrument under which the said Travis Transportation Company, Incorporated, was authorized to operate at Travis Air Force Base as an air carrier of passengers for hire?

7. On January 25, 1960, did the E & J Travel Bureau, Inc., through one of its agents or employees, sell to one Salvatore Messina a taxi flight from Travis Air Force Base, California, to San Francisco International Airport, via Travis Transportation Company, Incorporated?

8. If your answer to Question 7 above is "yes," can you and did

you append to your answers to these interrogatories a photostatic or thermofaxed copy of the receipt issued to the said Mr. Messina for the said trip?

9. If your answer to Question 7 above is "yes," please state the amount of the fare for the said trip and whether it was prepaid by Mr. Messina or whether it was charged to the Government.

10. On January 25, 1960, did the E & J Travel Bureau, Inc., through one of its agents or employees, sell to the said Salvatore Messina an air flight from San Francisco International Airport to Washington, D.C., via United Air Lines, Inc.?

11. If your answer to Question 10 above is "yes," can you and did you append to your answers to these interrogatories a photostatic or thermofaxed copy of the receipt issued to the said Mr. Messina for the said trip?

12. If your answer to Question 10 above is "yes," please state the amount of the fare for the said trip and whether it was prepaid by Mr. Messina or whether it was charged to the Government.

13. Are you also President of the said Travis Transportation Company at this time?

KELLY, KEATING AND LEAHY

/s/ John Joseph Leahy

[Certificate of Service, May 26, 1961]

[Filed June 17, 1961]

DEFENDANT'S POINTS AND AUTHORITIES IN
OPPOSITION TO MOTION TO SUPPLANT
INTERROGATORIES BY ORAL DEPOSITION

The Federal Rules of Civil Procedure permit the propounding of interrogatories to a witness.¹

Once a discovery procedure is commenced, that party is entitled to conclude his procedure before his adversary.²

The evidence sought to be elicited by the defendant is basic to its defense and it should not be hampered in getting such into the record at the earliest possible date.

Plaintiff avers that most if not all of the witnesses and documents necessary to her cause are located in California. That being so, it would seem proper that this action be dismissed on the grounds of forum non conveniens for none of the parties resides in the District of Columbia, none of the witnesses is located in said District, and the contract was not entered into in the District.³

Despite this, should the Court in its discretion later hold that the Plaintiff is entitled to take depositions, it might be proper for such leave to be granted on condition that the Plaintiff pay the reasonable expenses to which such procedure would subject the Defendant.

1. Rule 33, FRCP
2. Baugh v. Lee (D.C. - N.Y.) 26 Fed. Supp. 1000; 226 Holtzoff and Cozier
- 3.

[Certificate of service, dated June 16, 1961]

[Filed, June 27, 1961]

**NOTICE OF THE DEFENDANT REGARDING THE TAKING
OF WITNESS LT. GEN. JOE W. KELLY, JR.'S
DEPOSITION BY WRITTEN INTERROGATORIES**

**TO: Jackson, Gray & Jackson
* * *
Attorneys for Plaintiff**

Please take notice that the defendant, Mutual Benefit Health and Accident Association, proposes the following interrogatories to be propounded to Joe W. Kelly, Jr., Lt. General, USAF, Commander, Military Air Transport Service (MATS), USAF, Headquarters, Scott Air Force Base, Illinois, by Mr. Charles A. Becker, 31 Public Square, Belleville, Illinois, a Notary Public, on behalf of the defendant:

1. You are Joe W. Kelly, Jr., Lt. General, USAF, Commander, Military Air Transport Service, (MATS), USAF, Headquarters, Scott Air Force Base, Illinois?

2. Please state the relationship of the Military Air Transport Service, (MATS), USAF, to the United States Air Force.

3. Please state the functions of the Military Air Transport Service (MATS) at Travis Air Force Base, California, on January 25, 1960.

4. Please identify any orders that purported to authorize Charles W. Stark, Colonel, USAF, Commander, Travis Air Force Base, California, to bind the Military Air Transport Service (MATS) in contract for intrastate aircraft passenger flights prior to January 25, 1960.

5. If your answer to Question No. 4 above admits of any such authorization, can you and did you append to your answers hereto, marked "Affiants' Exhibit A," a true copy of such purported authorization?

6. Please state whether or not the flight of the twin-engine Piper-Apache plane, operated by the Travis Transportation Company, d/b/a Golden Gate Airways, which crashed on 25 January 1960, while enroute from Travis Air Force Base, California, to San Francisco International Airport, California, was one by, or contracted for by, the Military Air Transport Service (MATS).

7. Please state the distinction between airlift contracted for by MATS compared to the operation of an air-taxi service conducted by a commercial carrier to and from the Travis Air Force Base pursuant to a revocable permit issued by the said Travis Air Force Base Commander.

KELLY, KEATING AND LEAHY

/s/ John Joseph Leahy

[Certificate of Service, June 26, 1961]

[Filed, July 12, 1961]

**ORDER DENYING MOTION OF PLAINTIFF TO COMPEL
DEPOSITION OF WITNESS JAMIESON TO BE TAKEN
UPON ORAL INTERROGATORIES**

Upon consideration of the motion of the plaintiff filed herein on June 7, 1961, to compel the deposition of William S. Jamieson to be taken upon oral interrogatories instead of written interrogatories, the authorities submitted in opposition thereto and arguments heard thereon in open court, it is by the court this 13 day of July, 1961

ORDERED, that the said motion of the plaintiff be and it is hereby denied.

/s/ Judge Edward A. Tanner

[Filed, July 20, 1961]

**OBJECTIONS TO INTERROGATORIES PROPOUNDED TO
WILLIAM S. JAMIESON**

Comes now the plaintiff through counsel, and objects to the Interrogatories hereinafter enumerated.

5. Interrogatory #5 calls for a conclusion of law and, in effect, asks the witness for an opinion upon one of the ultimate issues in the case without first identifying or asking what, if any, writings relevant to the question are in existence.

7-12. Objection is made to Interrogatories 7-12 inclusive on the ground that the information sought is wholly irrelevant to the issues in this case.

JACKSON AND GRAY

/s/ Darryl L. Wyland

[Certificate of Service, July 20, 1961]

[Filed, July 20, 1961]

**OBJECTIONS TO INTERROGATORIES PROPOUNDED TO
ROBERT D. LICHTY**

Comes now the plaintiff through counsel, and objects to the Interrogatories hereinafter enumerated:

4-7. Objection is made to Interrogatories 4-7 inclusive upon the ground that the information sought is wholly irrelevant to the issues in this case.

JACKSON AND GRAY

/s/ Darryl L. Wyland

[Certificate of Service, July 20, 1961]

[Filed, July 20, 1961]

**OBJECTIONS TO INTERROGATORIES PROPOUNDED TO
LT. GEN. JOE W. KELLY, JR.**

Comes now the plaintiff, through counsel, and objects to the Interrogatories hereinafter enumerated:

3. Interrogatory #3 is extremely broad in scope and would, in order to be answered fully, require irrelevant information in wholesale lots; would require the witness to interpret the legal effect of applicable statutes and Air Force regulations, and would permit the witness to give his opinions of what functions MATS is supposed to perform at Travis.

6. That part of Interrogatory #6 which asks whether the flight was one contracted for by MATS is objectionable for the reasons that it (1) calls for a legal conclusion, and (2) calls for an opinion upon one of the ultimate issues in this case.

7. The distinction between the two types of operations set forth in Interrogatory #7 is wholly irrelevant to the issues in this case, and the said Interrogatory, in addition, requires an interpretation by the witness of any applicable statutes, directives and regulations relating to the two types of operations.

JACKSON AND GRAY

/s/ Darryl L. Wyland

[Certificate of Service, July 20, 1961]

[Filed, November 7, 1961]

ORDER OVERRULING OBJECTIONS TO INTERROGATORIES

Upon the consideration of the objections filed by the plaintiff herein to the interrogatories of the defendant, proposed to be propounded to William S. Jamieson, Robert D. Lichty and Lt. General Joe W. Kelly, as witnesses for the defendant, and the type of answers allegedly called for on said interrogatories, and after hearing argument thereon in open court, it is by the Court this 7 day of November, 1961

ORDERED, that the objections of the plaintiff to the said interrogatories are overruled; it is

ADJUDGED, that the admissibility of the answers to the said interrogatories is a matter for decision by the Trial Court, and it is further

ORDERED, that the said interrogatories are to be answered within twenty days of the date of this order.

/s/ Judge Joseph C. McGarraghy

[Filed, January 12, 1962]

**INTERROGATORIES PROPOUNDED BY DEFENDANT
TO PLAINTIFF**

To: Jackson, Gray & Jackson * * *
Attorneys for Plaintiff

Defendant propounds to the plaintiff pursuant to Rule 33, F.R.C.P., the following interrogatories relating to the issues of this action, to be answered separately and fully in writing under oath within fifteen (15) days following service of same:

Interrogatories by Defendant to Plaintiff

1. State whether or not the carrier operating the flight on which the insured's death occurred was the Royal Canadian Air Force Air Transport Command or the Royal Air Force Air Transport Command of Great Britain.

2. State whether or not the carrier operating the flight on which the insured's death occurred was The 315th or 322nd Air Division or the 5060th Transportation Squadron of the United States Air Force.

3. Identify the instrument or instruments referred to, in your answer to Question No. 5 of the defendant's interrogatories previously propounded to you, as the contract of the Military Air Transport Service (MATS) of the United States.

KELLY, KEATING AND LEAHY

/s/ John Joseph Leahy

[Certificate of Service, January 12, 1962]

[Filed, February 1, 1962]

ANSWERS TO INTERROGATORIES

1. No.

2. No.

3. The basic instrument relied upon is the one annexed to the "Request for Admission of Genuineness of Document" as Exhibit "A" and served upon the defendant on June 23, 1961.

/s/ Josephine L. Messina

DISTRICT OF COLUMBIA, SS.:

JOSEPHINE L. MESSINA, being first duly sworn on oath deposes and says that she has read the foregoing and annexed Answers to

Interrogatories by her subscribed and knows the contents thereof; that the matters and things stated therein are true to the best of her information, knowledge and belief.

/s/ Josephine L. Messina

Subscribed and sworn to before me this 1st day of February, 1962.

/s/ Zoe M. Shea, Notary Public,

JACKSON AND GRAY,

/s/ Darryl L. Wyland

[Certificate of Service, February 2, 1962]

[Filed November 14, 1963]

REQUEST FOR ADMISSION UNDER
RULE 36

Plaintiff, Josephine L. Messina, requests defendant, Mutual Benefit Health and Accident Association, within ten (10) days after service of this Request, to make the following admissions for the purpose of this action only, and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That the following document, exhibited with this Request, is genuine: "Request for Passenger Air Taxi Service at Travis Air Force Base, California, dated February 2, 1959", (Plaintiff's Pre-Trial Exhibit No. 3).

2. The following statements are true:

(a) When the deceased, Salvatore H. Messina, purchased the insurance policy from the vending machine at Tachikawa Air Force Base, Japan, he received only the original of this policy and no copies.

Request for Admission

(b) The above mentioned original of the insurance policy was mailed to the plaintiff prior to the deceased's arrival at Travis Air Force Base, California.

JACKSON, GRAY & LASKEY

/s/ Austin P. Frum

Attorneys for Plaintiff

1025 Connecticut Avenue, N.W.

Washington, D. C. 20036

[Certificate of Service, dated November 13, 1963]

HEADQUARTERS
5TH AIR BASE GROUP
United States Air Force
Travis Air Force Base, California

FEB 2, 1959

SUBJECT: Request for Passenger Air Taxi Service at Travis
Air Force Base, California

TO: Regional Director
Military Traffic Management Agency
Western Traffic Region
Oakland Army Terminal
Oakland 14, California

1. The existing surface transportation services at Travis Air Force Base are not considered adequate to meet the demands of present day travel requirements. Request negotiations be undertaken to establish an Air Taxi Service at Travis AFB. The attached proposal from Travis Air Service, 715 Marin Street, Vallejo, California is submitted in accordance with the provisions of paragraph 105003, Air Force Manual 75-2, and paragraph 7, Air Force Regulation 87-7. We have no objections to Air Taxi Service utilizing Travis provided the operator complies with CAA, CAB, California Public Utilities Commission, and Air Force Directives and Regulations.

Exhibit Attached to Request for Admission

2. Travis Air Force Base is the West Coast Aerial Port of Embarkation and Debarkation for the Pacific overseas areas and approximately 25,000 PCS and TDY travelers transit the base each month. These units are assigned and depend upon the 5th Transportation Squadron for transportation services:

a. Hqs Western Transport Air Force; Hqs 323rd Air Division; Hqs 5th Air Base Group; Hqs 3083rd Aviation Depot Group; 13th Aeromedical Transport Squadron; Hqs 14th Air Division; Hqs 5th Bombardment Wing (B); Hqs 1501st Air Transport Wing (B); 436th AA Missile Battalion; Hqs 29th Artillery Group; USAF Air Traffic Coordinating Office; Royal Air Force Detachment; 505th Field Training Detachment; 66th Signal Detachment; USAF Hospital; 9th Weather Squadron; Joint Task Force Seven; 1901st AACCS; Aerial Port Support, and Office of Special Investigation. Most travel requirements are requested on short notice and frequently are of an emergency nature.

b. Air Taxi Service is required between Travis Air Force Base, Oakland Municipal Airport, and San Francisco International Airport. There is no established or authorized Air Taxi Service between the above points.

3. Present passenger service available:

<u>TYPE</u>	<u>COSTS</u>	<u>TRIP TIME</u>
Local Bus	\$2.28 each ticket	3 1/2 hours
Express Bus	\$3.36 each ticket	2 1/2 hours
Vaca Valley		
Charter Volkswagon	21.00 1-7 psgrs	1 3/4 hours
Travis Taxi Cab	26.00 1-5 psgrs	1 3/4 hours
*Military Vehicle	21.00 (Round trip)	4 hours (R.T.)
*(Road mileage from Travis AFB to SF Int'l is 67 miles)		

a. The Base Motor Pool at Travis is operating with a shortage of 14 Staff Cars or Station Wagons below UAL Vehicle authorized allocations. Costs based on DD Comptroller 213 R-1 report of 12¢ per mile per Staff Car and labor charge of \$1.25 per hour pay scale for Airman 1st Class Driver.

Exhibit Attached to Request for Admission

b. Three month summary of military vehicles utilized for official travel:

MONTH	TRIPS	*PASSENGERS	MILITARY COST	**PROPOSED AIR TAXI COST
Oct.	212	406	\$ 4468.96	\$ 5590.00
Nov.	316	459	6651.28	6885.00
Dec.	243	422	5122.44	6330.00
TOTAL	771	1287	\$16252.68	\$18805.00
AVERAGE:	257	423	\$ 5417.56	\$ 5761.00

* First Class Commercial Air Tickets authorized 40 pounds of baggage, per person, for passengers originating within the continental limits of the United States at no additional charge and 66 pounds of baggage, per person, that are extra-territorial origination.

** The Air Taxi costs based on a single fare of \$15.00 per passenger which would be the maximum rather than the Charter Fare mentioned in the proposed agreement which would be utilized whenever it would be more advantageous.

c. Commercial Bus Service utilized for Official travel over a three month period:

<u>LOCAL SERVICE PSGRS-COST</u>			<u>EXPRESS PASSENGERS - COST</u>	
Oct.	45	\$102.60	277	\$ 930.72
Nov.	56	127.68	331	1112.16
Dec.	41	93.48	275	924.00
TOTAL	142	\$323.76	883	\$2966.88
AVERAGE	47	\$107.92	294	\$ 988.95

(1) There are no figures available for taxicab service as taxi is not used for official travel.

d. It is the intent of the Transportation Office to only issue Government Transportation Requests for Air Taxi Service on the basis of requirements to complete an Official mission. It is estimated by the Travis JAMTO representative that an average of 800 passengers per month would utilize Air Taxi Service.

(1) A recapitulation of total Official passengers that would use Air Taxi Service covering a three month period:

Exhibit Attached to Request for Admission

(a) Local Bus Service	-	142
Express Bus Service	-	883
Military Vehicles	-	1287
		2312

(b) Average monthly potential 770 psgrs.

c. Scott Air Force Base, Illinois has approved Air Taxi Service and monthly potential is 900 passengers. The Travis estimate is for outbound passengers and is considered conservative. The inbound passenger potential has not been estimated.

4. MATS and Commercial Contract passenger flights arrive and depart Travis AFB to overseas areas in great frequency on a 34 hour basis. These flights are often delayed enroute or they are scheduled to arrive Travis with minimum connecting times to meet the regularly scheduled domestic Airline Flights. Personnel arriving on these overseas flights are generally tired and most anxious to complete their travel by making as close connection as time permits. Present surface transportation is slow and time consuming and it is often impossible to connect with the more direct non-stop flights to other sections of the country. The JAMTO representative at Travis is doing an excellent job of confirming space reservations on last minute requests which constitute the greatest percentage of travel.

(a) Military vehicles are authorized for Colonels and above; civilian employees of the Government that are of equal rank to colonels and above; other individuals of lesser rank or grade when approved by the Base Motor Pool Officer under emergency conditions.

(b) The frequency of present commercial surface transportation is as follows:

(1) Local Bus - Vaca Valley Lines connecting with Western Greyhound Lines at Fairfield and San Francisco, California, requiring two changes involving baggage handling for a trip of three and a half hours. Departures are every hour and fifteen minutes between 0830 and 0035 daily.

(2) Express Bus - Western Greyhound Lines depart the passenger terminal at Travis AFB daily at 0400, 1155 and 1715. No changes are required and travel time is two hours and fifteen minutes.

(3) Vaca Valley Charter Volkswagon - Available on a 34 hour charter basis. One of the group must make charter arrangements through the E & J Travel Bureau. Travel time one and three quarter hours.

(4) Travis Taxicab - Available on a twenty four hour basis. Travel time of one and three quarter hours.

(5) Military Vehicles - Available when conditions for authorization are met.

(6) Proposed Air Taxi Service - Available on a twenty four hour basis. Travel time of thirty minutes.

c. Consideration should be given to the mission by the Transportation Officer and to local conditions existing as well as traffic factors via surface transportation when selecting the mode to be used between Travis AFB and San Francisco Airport.

(1) U.S. Highway 40, which is the normal route of travel, has high traffic peaks during rush hour periods.

(2) It is necessary to traverse two toll bridges that frequently snarl and create heavy backlogs and traffic jams.

(3) It is necessary to make the final leg of the trip via Bay Shore Highway (U.S. 101), which is best known in this area as "Bloody Bayshore", a reputation created by accident frequency.

d. Local carriers listed in sub-paragraph b.

e. Transportation difficulties experienced by passengers with existing authorized carriers are usually beyond the carriers control in most cases. The space age and the implement of Jet Commercial Passengers Service dictates new requirements for more desirable types of passenger comforts and conveniences. Air Taxi Service will help fill this requirement.

f. Air Taxi Service is required on a permanent basis at Travis Air Force Base, California.

g. Copy of carrier application to serve Travis Air Force Base is attached. The carrier has been authorized to operate an Air Taxi Service by the Civil Aeronautic Authority. Permission and approval is needed from USAF to use the facilities of Travis AFB and authority granted to issue Transportation Requests.

5. For further information, contact Captain Allen Maestra, Commercial Transportation Officer, 5th Transportation Squadron, Travis Air Force Base, California.

1 Incl
Carrier Application
w/ attachments

CHARLES W. STARK
Colonel, USAF
Commander

I certify that this is a True Copy of original correspondence in my files, and under my control and supervision.

/s/ Robert D. Lichty

ROBERT D. LICHTY

Captain, USAF

Com'l Transp Officer 20 Dec 60

[Filed, December 19, 1963]

**ORDER SUSTAINING OBJECTIONS OF DEFENDANT TO
REQUEST FOR ADMISSIONS UNDER RULE 36**

Upon consideration of the objections of the defendant to the request of plaintiff for admissions under Rule 36, FRCP, and after hearing arguments thereon and noting that said request was filed after plaintiff certified the case to be placed on the Ready Calendar, it is by the court this 18 day of December 1963

Order Sustaining Objections to Request for Admissions

ORDERED, that the said objections of the defendant to the request of plaintiff for admissions under the above rule be, and they are hereby, sustained; it appearing that defendant's counsel stipulates that Plaintiff's Pre-trial Exhibit No. 3 may be admitted in evidence at trial without formal proof provided same is offered as a part of her cross-interrogatories; and that plaintiff's counsel concedes that the insurance policy sued on was not obtained from a vending machine.

/s/ Judge Alexander Holtzoff

[Certificate of Service, December 17, 1963]

United States District Court
for the
District of Columbia

Mrs. Josephine L. Messina

Plaintiff.

vs.

Civil Action No.

3776-60

Mutual Benefit Health and Accident Association

Defendant.

To: The Comptroller General of the United States
90 Allen N. Humphrey, Rm. 7140, GAO Bldg, 4th & G St.
NW

YOU ARE HEREBY COMMANDED to appear in (this court) ~~(the office of)~~

to give testimony in the above-entitled cause on the 28th day of January, 1964,
at 9:30 o'clock A m. (and bring with you) CFR T 3, which was effective on January
25, 1960 and AR 55-355, effective Jan. 25, 1960

and do not depart without leave.

HARRY M. HULL, Clerk.

By

James L. Murray

Deputy Clerk.

Date January 27, 1964Jackson, Gray & Maskey

By:

A. P. FunnAttorney for { Plaintiff.
~~Defendant.~~

RETURN ON SERVICE

Summoned the above-named witness by delivering a copy to him and tendering to him the fees for one day's attendance and mileage allowed by law, on the 28th day of Jan., 1964, at 9:30 AM

Dated

Jan. 28, 1964

Subscribed and sworn to before me, a

Notary Public

this

29

day of

January, 1964

NOTE.—Affidavit required only if service is made by a person other than a U. S. Marshal or his deputy.

James L. Murray
Deputy Clerk

[Filed, April 24, 1964]

MEMORANDUM

This is a suit by the beneficiary of a life insurance policy against the defendant insurance company for the proceeds of a \$50,000 policy purchased by plaintiff's husband while en route from Korea to his home in Maryland. The issue is whether the flight which crashed, killing plaintiff's husband, was within the risks covered by the policy.

Salvatore Messina, a civilian employee of the Department of the Army, Corps of Engineers, was employed as a construction representative in Seoul, Korea, in January, 1960. Due to a reduction in force, Mr. Messina was ordered back to his home in Brentwood, Maryland. His travel from Seoul, Korea, to Maryland was pursuant to Government travel orders. Mr. Messina travelled from Korea to Tachikawa Air Force Base, Japan, and there he purchased from the defendant herein a policy of insurance in the face amount of \$50,000, naming his wife as beneficiary. He mailed the policy to his wife at his home address. Mr. Messina flew from Tachikawa Air Force Base to Travis Air Force Base, California, on a commercial air carrier on a flight contracted for by the Military Air Transport Service (MATS). Upon his arrival at Travis, on January 25, 1960, Mr. Messina purchased, with a Government transportation request, a ticket on a United Airlines flight from San Francisco International Airport to Washington, D.C. Mr. Messina also purchased, with \$15 of his own money, a ticket on a flight operated by Travis Transportation Company, Inc., from Travis to San Francisco International Airport; Travis and San Francisco Airport are about sixty-seven miles apart, and the flight was by "air-taxi"—a non-scheduled service operating between the two airports. The plane on which Mr. Messina was riding crashed en route to San Francisco International Airport, and Mr. Messina suffered fatal injuries. The plaintiff, his

widow, gave timely notice to the defendant and submitted the required proof of loss within the ninety-day period after Mr. Messina's death. On March 16, 1960, the defendant notified Mrs. Messina that it denied her claim on the ground that Mr. Messina was not covered under the terms of the policy. Thereafter the plaintiff filed her suit herein.

The sole issue is whether the fatal flight was covered by the insurance policy which Mr. Messina purchased.

On the first page of the four-page form contract, the following words appear at the top in bold-face:

This Policy is Nonrenewable and Provides Benefits for Loss of Life, Limb or Sight and Other Specified Losses Resulting from Accidental Bodily Injuries Received While a Passenger on Scheduled Airlines and Other Specified Conveyances or While on the Premises of an Airport to the Extent Herein Provided.
(Emphasis added.)

Then follows a "SCHEDULE," on which the purchaser fills in his name and address, the beneficiary's name and address, the point of departure, the destination, and the amount of the policy, the effective date, and the premium. On Mr. Messina's policy, the point of departure was listed as "TAW," which is the symbol for Tachikawa Air Force Base, Japan; the destination was listed as Washington, D.C.

The following language then appears in small but legible type beginning on the first page and running over to the second:

In consideration of the payment of the premium shown in the Schedule, the Association, subject to the provisions, limitations and exceptions of this policy, hereby insures the person named as Insured in the Schedule against loss of life, limb or sight and other specified losses resulting, independently of all other causes, from injuries. The term "injuries," wherever

used in this policy, shall mean accidental bodily injuries received during any portion of the first one way or round trip which is made by the Insured, while this policy is in force, between the Point of Departure and the Destination designated in the Schedule and for which the Insured has purchased a transportation ticket or has been issued a pass; provided such injuries are received (1) while riding as a passenger in, boarding or alighting from, or by being struck by an aircraft operated on a regular, special or chartered flight (a) by a scheduled airline of United States Registry holding a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board of the United States of America or its successors, (b) by an intrastate scheduled airline of United States Registry maintaining regular published schedules and licenses for the transportation of passengers by a duly constituted authority having jurisdiction over civil aviation in the state in which said airline operates, (c) by a scheduled airline of foreign registry maintaining regular published schedules and licenses for transportation of passengers by the duly constituted governmental authority having jurisdiction over civil aviation in the country of registry of such airline, (d) by, or contracted for by, the Military Air Transport Service (MATS) of the United States, (e) by the Royal Canadian Air Force Air Transport Command or the Royal Air Force Air Transport Command of Great Britain, or (f) by the 315th or 322nd Air Divisions or the 5060th Transportation Squadron of the United States Air Force; or (2) while in or upon any premises or surface vehicle used for passengers and provided or arranged for by such airline or the authorities controlling an established airport, but only while the Insured is in or upon such premises or surface vehicle for the purpose of beginning, continuing or completing the air trip designated in the Schedule. (Emphasis added.)

All of the above provisions are in black ink, except for the portions of the "SCHEDULE" filled in with blue ink. In addition, in very light-faced, pale green printing, the following words appear:

Read Carefully
This Policy Is Limited
To Aircraft Accidents
on Scheduled Airlines

These words are set on a diagonal and are covered with the small black type of the long contractual provision set out above, making both the green printing and the black printing over it difficult to read. A casual reader would be likely to fail to read the green type at all.

The issue in this case is whether the fatal flight was "a regular, special or chartered flight * * * contracted for by, the Military Air Transport Service (MATS) * * *," since none of the other specified types of flights applies.

1. It is conceded that the flight was not actually "by" MATS, thus limiting the issue to the above-quoted portion of the policy dealing with flights "contracted for" by MATS.

The Court has concluded, for reasons to be set forth hereinafter, that the fatal flight was covered by the insurance policy, and that plaintiff is therefore entitled to recover.²

2. At the request of the Court, the parties have briefed the question of which law should govern the substantive issues in this case. Defendant has argued that the law of Japan should govern, since the contract was purchased in Japan, and that since plaintiff has offered no proof of Japanese law, the case should be dismissed. The Court, however, agrees with plaintiff that it would be contrary to the intention of the parties and contrary to sound judicial administration to apply the law of Japan to the interpretation of this contract when the contract was purchased by an American citizen passing through Japan on his way back to the United States to his

permanent residence in Maryland, and was sold by an American insurance company with home offices in Nebraska. See Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954). American Contract law will therefore be applied. The Court need not decide which American jurisdiction governs, since neither party has suggested that the courts of any one state would decide the issues presented herein any differently from the courts of other states. In any event, the court would be justified in assuming that Japanese law contains the same governing principles of the law of contracts.

It is hornbook law that ambiguities in a standard-form contract are generally to be resolved against the party who drafted the document. In this case, this principle requires this Court to construe the insurance policy liberally in favor of the purchaser and his widow, the plaintiff herein. Smith v. Indemnity Ins. Co., 115 U.S. App. D.C. 295, 298 (1963). The policy must therefore be interpreted from the point of view of the ordinary understanding of a reasonable person in the position of Mr. Messina at the time of purchase. "We all know that a contract of insurance, drawn by the insurer, must be read through the eyes of the average man on the street or the average housewife who purchases it. Neither of them is expected to carry the Civil Aeronautics Act or the Code of Federal Regulations when taking a plane." Lachs v. Fidelity & Cas. Co., 306 N.Y. 357, 118 N.E.2d 555, 558 (1954).

There are a number of important ambiguities in the policy. First, there is a clear conflict between the light green print, which limits coverage to scheduled airlines, and the boldface heading and body of the contract, both of which are broader in coverage, including flights by MATS, which may well be non-scheduled. Second, the policy specifically covers all "regular, special, or chartered" flights by the designated airlines, while the light green print limits coverage to scheduled airlines; to the ordinary reader, these provisions would appear to conflict with each other, since such reader would be un-

likely to differentiate chartered flights run by "scheduled" airlines from chartered flights run by "non-scheduled" airlines. In short, the fact that coverage extends to "regular, special, or chartered" flights would be more important to the ordinary reader than the limitations as to various kinds of airlines, the technical definitions of which would not be understandable even to a diligent reader. The reference to "special" and "chartered" flights would have led a reasonable person in Mr. Messina's position to believe that the air-taxi flight was covered—unless some clear warning to the contrary can be discovered in the terms of the policy.

No such clear warning exists. In fact, other provisions in the policy would have reinforced the conclusion that the air-taxi flight was covered. Three specific references to coverage for the entire airtrip described in the "SCHEDULE" (filled in by the purchaser) would have led the ordinary reader in Mr. Messina's position to conclude that all connecting flights between the "point of departure" (Tachikawa) and the "destination" (Washington, D.C.) would be covered. Two of these references are quoted above: one extending coverage to injuries received "during any portion of the first one way or round trip which is made by the Insured * * * between the Point of Departure and the Destination designated in the Schedule * * *;" the other dealing with ground transportation "for the purpose of beginning, continuing or completing the airtrip designated in the Schedule." (Emphasis added.) The third reference is in the policy clause dealing with the effective date of the policy: "This insurance shall commence on the Effective Date at 12:01 A.M., Standard Time at the Point of Departure, and shall terminate either upon completion of the airline trip described in the Schedule or upon expiration or surrender for refund or credit of said transportation ticket, but in no event shall this insurance extend beyond a period of twelve months." (Emphasis added.) The impression left by these provisions that the policy covers the complete airtrip from point of de-

parture to point of destination is made even stronger by the fact that defendant has conceded that both the completed trip from Japan to Travis Air Force Base and the projected trip from San Francisco to Washington, D.C. are specifically covered by the policy. It thus would have required clear warning that an intermediate air-taxi flight would not be covered in order to exempt the flight from Travis to San Francisco from the continuous coverage implied in the policy. Not only is such warning completely missing; even if it had existed it would have been made ambiguous and obscure by the specific coverage extended to "special" and "chartered" flights, as discussed above.³

3. The fact that the Army considered Mr. Messina to be in "duty status" until his arrival at Brentwood, Maryland, reinforces the conclusion that his entire trip was a continuous one. This conclusion is fortified by the additional fact, supported by regulations offered in evidence by plaintiff, that Mr. Messina could have been reimbursed for the air-taxi flight out of Army funds. However, the Court is not relying upon these facts as essential to its decision. The Court need not pass upon defendant's objections to these conclusions, advanced on various evidentiary grounds; if it were necessary to pass upon these items of evidence, defendant's objections would be overruled.

There is one further fact which bears upon the proper interpretation of this policy. Mr. Messina filled in the name and address of his wife on the back of the policy, and mailed it to her before he left Tachikawa Air Force Base in Japan. The company provided no duplicate, so that when Mr. Messina arrived at Travis and decided to take the air-taxi flight, he would have had only his memory to tell him whether or not the air-taxi flight was covered under the policy. In these circumstances, the impression that the policy covered the continuous flight from Japan to Washington, D.C. would have been stronger than ever. See Steven v. Fidelity and Cas.Co., 27 Cal. Rptr. 172, 377 P.2d 284, 294 (1962), where the fact that an insurance

policy had been mailed influenced the court in concluding that at air-taxi flight was covered.

It is in the light of these considerations that the Court must interpret the proviso that the air-taxi flight is covered only if it is a flight "contracted for by the Military Air Transport Service (MATS) * * * ." If the ordinary person in Mr. Messina's position had inquired whether the flight was or was not "contracted for" by MATS, he would have been shown a document called a "Revocable Permit." This document, signed by the Base Commander of Travis Air Force Base (a base assigned at that time to MATS; the commander was an officer of MATS), and by the President of Travis Air Taxi Service, permitted the Air Taxi Service to use without charge the landing and parking facilities of the base "for the express purpose of providing air taxi service from Travis Air Force Base to the San Francisco bay area." The document did not purport to grant the Air Taxi Service exclusive rights. The permit was to be effective "until terminated," either mutually at any time, by either party on thirty-day written notice, or by the Base Commander for non-compliance or emergency conditions. In return for the right to land and take off, the Air Taxi Service agreed to transport passengers on the following priority basis:

FIRST PRIORITY: Department of Defense personnel travelling on official orders at the expense of the United States Government.

SECOND PRIORITY: Military personnel travelling on emergency leave.

THIRD PRIORITY: All Department of Defense personnel, including contract employees and dependents thereof.

FOURTH PRIORITY: Non-priority seating will be on a first-come, first-serve basis.

The document set maximum prices. It also incorporated by

reference certain FAA safety requirements, and in a supplement specified minimum visibility ceilings more stringent than those required by the FAA. According to the supplement, passengers were to be carried on multi-engine aircraft only. In addition, the following provision governed the service to be provided:

Aircraft will be non-scheduled and will depart at discretion of [Travis Air-Taxi Service]. However, weather conditions permitting, flights will depart after no longer than two hours after one passenger has contracted for the flight service.

(Emphasis added.)

Both parties agree that a contract is an agreement between two or more parties to do (or not to do) a certain thing, based upon sufficient consideration. Even though the Air Taxi Service and the Base Commander did not label the above document a "contract," it has all the essential elements of a contract, at least from the point of view of a reasonable man in Mr. Messina's position had he been shown the document. There is benefit flowing to both parties—to the Air Taxi Service from the fares it can collect from persons flown from Travis; to the Base Commander (and MATS) from the quicker connections between air fields and the priority seating arrangements.⁵ There is also a detriment to each party—to the Air Taxi Service in being bound to supply service no longer than two hours after one passenger has requested the service; and to MATS in the wear and tear upon the runways and other facilities. In return for the promise by the Air Taxi Service to provide service even when there was only one person desiring it, and to provide such service on a priority service, the Base Commander promised for MATS to let the Air Taxi Service use the facilities of the base. So long as the agreement was in force, each party was obligated, and each benefited. The essential requisites of a contract were thus present.⁶ This Court has therefore concluded that for the purposes of deter-

mining whether this flight was covered by the insurance policy, the flight was one "contracted for by" MATS.⁷

5. In a memorandum dated February 2, 1959, (offered in evidence by plaintiff) from the Base Commander to the Military Traffic Management Agency, the Base Commander described in great detail the connecting services available between Travis and San Francisco Airport in his request for permission to grant approval to the Air Taxi Service to begin operations between the two airports. Defendant objects to the admission into evidence of the opinion of the Base Commander that existing surface connections were inadequate since the Base Commander was not present for cross-examination; but defendant does not object to the admissibility of the supporting factual data—indicating surface travel times varying between one hour and three-quarters to three hours and one-half. This factual data speaks for itself in supporting the Court's conclusion that MATS received a benefit from granting the Air Taxi Service the right to operate between Travis and San Francisco Airport.

6. Defendant argues that the Base Commander had no authority to "contract" on behalf of MATS, although he does not question the fact that the Base Commander had authority to issue the so-called "revocable permit." Since the Base Commander did have authority to do what he did in issuing the permit, and since the Court has construed that permit as a contract for the purposes of this case, any lack of authority to "contract" on behalf of MATS in some other regard is irrelevant to this case. In any event, since the issue in this case is whether a reasonable man in Mr. Messina's position would have interpreted the insurance policy as covering this flight as one "contracted for by" MATS, such a reasonable man would have been justified in relying upon the Base Commander's apparent authority (as distinct from actual authority) in "contracting" on behalf of MATS.

7. Differences between the language of the insurance policy in the present case and policies in other cases, cited both by plaintiff and defendant, make the other cases not persuasive on the issues presented in the present case. See *McBride v. Prudential Ins. Co.*, 147 Ohio St. 461, 72 N.E.2d 98 (1947) (interpreting "regularly scheduled passenger flight of a commercial aircraft" to bar coverage of a plane hired for a hunting trip); *Lachs v. Fidelity & Cas.*

Co., 306 N.Y. 357, 118 N.E.2d 555 (1954) (holding the words "scheduled airline" ambiguous enough to extend coverage to the particular flight involved, an an "Airline Trip Insurance" policy purchased from an automatic vending machine); Thompson v. Fidelity & Cas. Co., 16 Ill. App.2d 159, 148 N.E.2d 9 (1958) (interpreting "scheduled air carrier" as excluding coverage of the particular flight involved). None of these cases involved the phrase: flights "contracted for by" MATS.

Considering the insurance policy as a whole and the governing principles of law, this Court has concluded that plaintiff has sustained her burden of proving by a fair preponderance of the evidence that she is entitled to recover the proceeds of the insurance policy purchased by her husband.

The Court will also award plaintiff interest on the face amount of the policy from March 16, 1960, the date on which the defendant company rejected plaintiff's demand. This award of interest is required by D.C. Code §28-2707,⁸ since the face amount of the policy is a liquidated amount, and since interest is payable by law or usage in such cases, 3 Appleman, Insurance Law and Practice §§1581-1584 (1941 ed.). Defendant argues that D.C. Code §28-2709,⁹ permitting discretionary interest, applies. "But that provision [D.C. Code §28-2708] is not applicable where the action is for recovery of a liquidated indebtedness. In such case section 28-2707 D.C. Code (1951) applies." *Blustein v. Eugene Sobel Co.*, 105 U.S. App. D.C. 32, 36 (1959). See also *Rosden v. Leuthold*, 107 U.S. App. D.C. 89, 92 (1960). Plaintiff would be entitled to interest from the date of demand and proof of death. See *Royal Indemnity Co. v. Woodbury Granite Co.*, 69 App. D.C. 364, 369 (1938); 3 Appleman, Insurance §1584. But apparently plaintiff does not know the actual date of demand, and is content to request interest only from the date the demand was rejected. Since the insurance policy specifies no rate of interest, the statutory six per cent per annum will be applied. D.C. Code §28-2701.

8. "In an action in the United States District Court for the District of Columbia to recover a liquidated debt on which interest is payable by contract or by law or usage the judgment for the plaintiff shall include interest on the principal debt from the time when it was due and payable, at the rate fixed by the contract, if any, until paid." D.C. Code §28-2707.

9. "In an action to recover damages for breach of contract the judgment shall allow interest on the amount for which it is rendered from the date of the judgment only; but nothing herein shall forbid the jury, or the court, if the trial be by the court, from including interest as an element in the damages awarded, if necessary to fully compensate the plaintiff. * * * " D.C. Code §28-2708. Even if this provision did apply in the present case, the Court would award such interest since it is necessary "to fully compensate the plaintiff" for the amount which the proceeds could have earned since the time when such proceeds were due and payable.

Judgment will therefore be entered in favor of plaintiff in the amount of \$50,000 plus interest at six per cent per annum from March 16, 1960.

This memorandum will be considered as findings of fact and conclusions of law pursuant to Rule 52, Federal Rules of Civil Procedure.

/s/ Judge Luther W. Youngdahl

April 24, 1964

[Filed, May 8, 1964]

MOTION FOR AMENDMENT OF FINDINGS

The defendant, Mutual Benefit Health and Accident Association, by its attorneys, Kelly, Keating and Leahy, moves the court for an

Motion for Amendment of Findings

amendment of its findings upon which the judgment was entered herein on April 28, 1964, in the following respects:

1. That the reference to the kind of type used in the printed policy sued upon, appearing in line eight (8) of page three (3) of the court's Memorandum, be changed from "small but legible" to "ten-point (10) type."
2. That the portion of the last paragraph appearing on page four of the said Memorandum and the remainder of same appearing on page five (5) be changed to "Plaintiff concedes that the only pertinent portion of the insuring clause in the policy sued upon is (d) pertaining to 'a regular, special or chartered flight * * * contracted for by the Military Air Transport Service (MATS) * * *,¹ since none of the other specified types of flights applies."
3. That the footnote numbered one (1) on page five (5) be amended to read "It is conceded by the plaintiff that the fatal flight was not operated by MATS."
4. Delete lines two (2) to seven (7) inclusive on page nine (9) beginning with the words "The company" and ending with the words, "than ever".
5. Add a requirement that plaintiff's counsel mail defendant's counsel a copy of the order entered herein April 28, 1964, (which has not been furnished).
6. Add a requirement that plaintiff's counsel within ten days produce the original of the policy sued upon for reproduction by defendant's counsel in color (since the color of the printed warning on page one (1) thereof has been made a factor in the court's findings and the original is not in the file).

KELLY, KEATING and LEAHY

By: /s/ John Joseph Leahy
Attorney for Defendant

[Certificate of Service, dated May 8, 1964]

POINTS AND AUTHORITIES IN SUPPORT OF
MOTION FOR AMENDMENT OF FINDINGS

1. The type is of the well known ten-point variety, the size adopted in the Uniform Code of the National Association of Insurance Commissions and there is no allegation in the record of it being "small".
2. There is no stipulation that the said language constitutes "the" issue in this case.
3. There is no stipulation that the issue is limited to the above quoted portion of the policy.
4. There is no basis in the record for the said finding.
5. Ibid.
6. Rule 34, Federal Rules of Civil Procedure.

KELLY, KEATING and LEAHY

By: /s/ John Joseph Leahy
Attorneys for Defendant

[Filed May 28, 1964]

ORDER

Upon consideration of defendant's motion for amendment of the findings of this Court filed April 24, 1964, defendant's points and authorities in support thereof, and plaintiff's points and authorities in opposition thereto, it is by the Court this 28 day of May, 1964,

ORDERED That the memorandum of this Court filed April 24, 1964, be and the same is hereby amended in the following respects:

1. In the last paragraph on page four (4), the words "Both plaintiff and defendant agree that" shall be and the same are hereby deleted, and said paragraph shall begin as follows: "The issue in this case is, etc."

Order on Motion for Amendment of Findings

2. That footnote number 1 on page five (5) shall be and the same is hereby amended to read:

It is conceded by plaintiff that the fatal flight was not "operated * * * by" MATS, since it was not operated by MATS personnel and since the aircraft itself was not owned by the United States Air Force. The issue is thus limited to the above-quoted portion of the policy dealing with flights "contracted for" by MATS.

3. Lines two (2) through eleven (11) inclusive on page nine (9) beginning with the words "The company" and ending with the words "was covered" shall be and the same are hereby deleted, and in their place the following footnote shall be and the same is hereby added to the end of the previous sentence:

4. Although it is not essential to this Court's decision, the Court on the basis of the record before it concludes that the defendant provided no duplicate of the insurance policy. The existence of any such duplicate as a matter of standard practice is a fact peculiarly within the knowledge of the defendant, and defendant having produced no evidence thereon, it is permissible to infer that no duplicate copy was provided. Thus when Mr. Messina arrived at Travis and decided to take the air-taxi flight, he would have had only his memory to tell him whether or not the air-taxi flight was covered under the policy. In these circumstances, the impression that the policy covered the continuous flight from Japan to Washington, D.C. would have been stronger than ever. See Steven v. Fidelity and Cas. Co., 27 Cal. Rptr. 172, 377 P.2d 284, 294 (1962), where the fact that an insurance policy had been mailed influenced the court in concluding that an air-taxi flight was covered.

4. Footnotes four (4), five (5), six (6), seven (7), and eight (8) shall be and the same are hereby renumbered, respectively, five (5), six (6), seven (7), eight (8), and nine (9).

It is FURTHER ORDERED That defendant's request that in line

Order on Motion for Amendment of Findings

eight (8) of page three (3) the words "small but legible" be deleted shall be and the same is hereby denied, since the document speaks for itself, and it is

FURTHER ORDERED That defendant's request for a copy of the form order of April 28, 1964, shall be and the same is hereby denied, and it is

FURTHER ORDERED That in view of plaintiff's agreement to permit counsel for defendant to copy the insurance policy in color upon the return of the policy by the clerk's office, defendant's request for an order to that effect is denied as moot.

/s/ Luther W. Youngdahl
(Judge)

[Filed June 24, 1964]

NOTICE OF APPEAL

Notice is hereby given this 24th day of June, 1964, that Mutual Benefit Health and Accident Association, defendant to the above action, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 24th day of April, 1964, in favor of the plaintiff, Josephine L. Messina, against said defendant.

/s/ John Joseph Leahy
Attorney for Defendant

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1

Washington, D. C.

Friday, January 24, 1964.

The above-entitled case came on for trial before the HONORABLE LUTHER W. YOUNGDAHL, United States District Court Judge, at 11:15 o'clock a.m.

4

MR. FRUM: Your Honor, before I begin with the examination of this witness, I would like to call to the Court's attention that there are undisputed facts as stipulated in the pre-trial order and offer these in evidence in the case.

THE COURT: You have no objection to that, Mr. Leahy, that the undisputed facts indicated in the pre-trial order may be stipulated as undisputed, as follows:

That Policy No. T6AV, No. 18228 A on January 25, 1960, was issued by defendant company through its authorized agent, insuring the life of Salvatore H. Messina. Said policy was in force on January 25, 1960. Plaintiff, Josephine L. Messina was named as beneficiary under said policy.

The insured, Salvatore H. Messina, died from injuries received in the crash of an airplane operated by Travis Transportation Company, Inc., doing business as Travis Air Service, on the 25th day of January, 1960, while en route from Travis Air Force Base, California, to San Francisco International Airport, San Francisco, California.

5

The plaintiff notified the defendant, in writing, of the death of the said insured within twenty days from January 25, 1960, and submitted a written proof of loss to the defendant within ninety days from January 25, 1960.

MR. LEAHY: I do so stipulate, Your Honor.

THE COURT: Very well.

MR. FRUM: Also, Your Honor, in order that the Court may have

the policy before it, during the testimony, I would like to offer it now in evidence, the insurance policy.

THE COURT: You better have it identified as an exhibit.

(Mutual Benefit Policy T6AV, No. 18228 A, was marked Plaintiff's Exhibit No. 1 for identification.)

MR. LEAHY: No objection, Your Honor.

THE COURT: It will be received.

(Plaintiff's Exhibit No. 1, heretofore marked for identification, was received in evidence.)

Thereupon,

WILFRED J. HARREN

called as a witness on behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

6 BY MR. FRUM:

Q. Mr. Harren, would you state your full name, please? A. Wilfred J. Harren. * * *

Q. And what is your occupation, sir? A. I am a program analyst with the Department of Labor, Bureau of Employees Compensation. ***

Q. In your capacity as program director, do you have custody of the records of one Salvatore H. Messina, deceased, of the records for compensation claim for Salvatore Messina? A. I do.

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7 Q. Mr. Harren, do these records show that Salvatore Messina, while en route from Seoul, Korea to Brentwood, Maryland, was considered to be in a duty status?

MR. LEAHY: Objection, Your Honor.

THE COURT: Sustained. The records speak for themselves, counsel.

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(Department of Labor File No. X-1298188 of Salvatore Messina, was marked Plaintiff's Exhibit No. 2 for identification.)

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8 Do you have any objection to this exhibit, counsel?

MR. LEAHY: Since this file has been offered as proof of the alleged duty status of the deceased, I will offer no objection to it being
9 admitted as the official record of Workmen's Compensation Bureau, but this is subject to any portion thereof which may be referred to so far as relevancy and materiality is concerned.

THE COURT: Well, obviously, this case being tried before the Court and not before a jury, I am not going to consider any part of the record that is not relevant or material, and I will suggest to counsel now to indicate to the Court what portion of this record is necessary for your case.

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MR. FRUM:

I would like to call the Court's attention to, first of all, a document
10 which is entitled Official Superior's Report of Injury. This is signed by the Chief of the Construction Division of the United States Army Engineering Corps in the Far East, and it is dated the 10th of June, 1960, and signed and dated -- signed in Seoul, Korea. It is a report of the death of Mr. Messina and it states that he was killed in an aircraft accident en route from Travis Air Force Base to San Francisco International Airport, and the death occurred at 9:20 p.m., on the 25th of January, 1960, at Tilden Park, Berkeley, California.

It states that the individual was being carried in a duty status until he reached his point of hire, Brentwood, Maryland, after having been RIF'd, which I understand means reduction in force.

THE COURT: Yes. Is that the only part of the record --

MR. FRUM: No, Your Honor, there is an official determination by the Bureau of Employees Compensation --

THE COURT: Will you read that, also? I would like to have you point out now just what portions you will rely on.

MR. FRUM: Yes, Your Honor. I will ask Mr. Harren if he will assist me in finding it.

THE COURT: All right.

11 THE WITNESS: What did you want?

BY MR. FRUM:

Q. The determination by the Bureau of Employees Compensation at the time of his death, that he was being carried in a duty status. A. Our determination?

Q. Yes. There is a letter dated June 22, 1961, signed by S. D. Logsdon, Chief, Division of Claims Services, and which states, among other things --

THE COURT: Of the Department of Labor?

MR. FRUM: This is to Mrs. Messina.

THE COURT: I mean, the Chief of the Division of Claims Services of the Department of Labor?

MR. FRUM: If that is his status, he is not so identified.

THE COURT: That is correct, isn't it?

THE WITNESS: Bureau of Employees Compensation.

THE COURT: All right. Department of Labor.

MR. FRUM: This is a letter to Mrs. Josephine L. Messina, 5605 Patterson Road, Riverdale Heights, Maryland, and it states:

"Your claim for compensation has been approved this date."

12 THE COURT: Now, are these the only two documents in this whole file that you need for this case?

MR. FRUM: Yes, Your Honor, that is all.

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THE COURT: Is there any cross-examination?

MR. LEAHY: Yes, Your Honor.

First of all, with reference to the proposed exhibits, I object to them on the ground of their relevancy and their incompetency. First of all, they express opinions of persons who are not here and who are not subject to cross-examination; they offer no basis for the validity of such opinions and, therefore, I am not satisfied that they are correct.

And, moreover, I see no relevancy as to any issue in this case

whether the deceased was on duty status or not. I am completely at a loss to see the relevancy of that point. This suit is on a so-called contract. Well, it is an insurance policy, and whether he was on duty
13 status or not, is beyond me, its materiality is beyond me.

THE COURT: What is your answer, counsel?

MR. FRUM: We offer this, Your Honor, in order to give the Court the whole picture of just exactly the nature of this man's trip and the fact that he was flying, or that he was traveling pursuant to orders, and we are about to introduce those orders, and that he was in a duty status when flying.

We feel this is important because of the fact that he comes under the MATS provisions, if I may use that term, of this policy.

THE COURT: Mr. Leahy further objects, and his objection was that they expressed mere opinions and consequently, they are incompetent.

MR. FRUM: I would say, Your Honor, that whether or not he was in a duty status is something that his employer is the one who determines, and this document is signed by his employer, namely, the Army Engineers headquartered in Korea. He is the one that makes that determination.

THE COURT: I think, in view of the fact that it has been established that these are part of the official records, that these records are competent to be received in evidence, and I will receive these two documents, subject to your objection, Mr. Leahy.

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* * *

(Official Report of Injury, Plaintiff's Exhibit 2-A, and Letter of June 22, 1961, Plaintiff's Exhibit 2-B, were received in evidence.)

* * *

15

Q. Upon what did you, yourself, make the determination that the deceased was on duty status at the time of his death? A. Did I make the determination?

Q. I am not sure that you did. Did you or did you not?

THE COURT: Who signed that document that you read, do you recall the name of the individual? Was it this witness that signed that document that the decedent was on duty status?

MR. FRUM: No, Your Honor.

THE COURT: Some other witness. Apparently, you didn't sign it, but you say you are familiar, nevertheless, with whether he was on duty status; is that your answer?

THE WITNESS: That's right.

THE COURT: And will you state how you became familiar with that fact?

THE WITNESS: Well, I became familiar with the fact by reviewing the file, prior to my appearance here.

BY MR. LEAHY:

Q. So your decision, your opinion was based upon the opinion of others; is that correct? A. I don't recall who made the decision in the case. I see it now. I made the decision on June 5th, 1961, that the man was in the performance of duty; I did that. I see it here, now.

16 Q. Very well. Now, will you tell us the basis of such decision?

A. The decision is based primarily on two documents in the file.

Q. Are they the ones that have been introduced in evidence? A. One has; one has not.

Q. Thank you.

MR. LEAHY: I have no further questions.

THE COURT: I would like to ask you to point out the one which has not been introduced, which was a factor in your determination that the decedent was in a duty status.

Will you point out that document?

THE WITNESS: The travel orders, Your Honor.

THE COURT: Then I think they should be in evidence as well, as long as you made the determination.

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17 MR. FRUM: I would like to offer in evidence as Plaintiff's Exhibit No. 3 --

THE COURT: Travel orders?

MR. FRUM: -- the travel orders which have been identified previously as Plaintiff's Pre-Trial Exhibit No. 7.

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18 MR. LEAHY: I have no objection, Your Honor.

THE COURT: It will be received.

(Travel Orders dated 29 December 1959, were marked Plaintiff's Exhibit No. 3, and received in evidence.)

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19 Q. Now, Mr. Harren, will you point to the portion of the exhibit and tell us wherein you determine from it that Mr. Messina, at the time of his death, was in duty status? A. Well, as I said before, the determination was made on two documents considered together. The Official Superior's Report of Injury, plus the Travel Orders, those two considered together. If you wish, I will tell you what specific items I would use.

THE COURT: That is apparently what he has in mind.

THE WITNESS: Is that what you want?

BY MR. LEAHY:

Q. Yes, with reference to the travel orders, the latest exhibit. A. Okay. On Item 11, it asks whether the employee was doing his regular work, it says, no.

Q. Just a moment, Mr. Harren. I am referring now to the travel orders which constitutes the latest exhibit that has just been admitted in evidence, Plaintiff's Exhibit No. 3.

THE COURT: Counsel wants to know, where is there anything in the travel orders to justify you considering that document together with the other document, to justify your conclusion that the decedent was in a travel status at the time of his death.

20 THE WITNESS: The travel orders show that he was authorized to travel from Seoul to what they call a port of entry, and from that point he was authorized to travel to Brentwood, Maryland.

THE COURT: Has it been the practice of the Department, in an administrative determination, that when an employee is so authorized that he is considered in duty status until he reaches his termination point?

THE WITNESS: That is the practice for all employees employed for overseas duty. They are considered to be in a duty status until they return to the point of hire.

THE COURT: Has that been a ruling of the Department?

THE WITNESS: That's right.

THE COURT: That is all I have to ask.

MR. LEAHY: Thank you.

BY MR. LEAHY:

Q. Now, before I ask you a question about the latest question that was brought up by His Honor, let me again ask you, with reference to these travel orders whether or not anything appears in those travel orders to indicate to you that Mr. Messina, at the time of his death, was on duty status? A. The travel orders, by themselves, do not prove that point.

21 Q. Very well. Do you have any document here, this morning, that will support your answer to His Honor's query about an official ruling to the effect you described? A. No.

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22 MR. FRUM: Your Honor, I would like to offer at this time in evidence the deposition of William S. Jamieson, taken on written interrogatories. This is a part of the file in this matter, and we are offering it, reserving the right to contest Mr. Jamieson's certain conclusions he reaches concerning the so-called revocable permit.

THE COURT: I don't know what you mean by that.

MR. FRUM: In response to a question by the defendant, No. 6, the question is: Was such activity under contract with the United States Military Transportation Service, and Mr. Jamieson states, no, and then goes on to --

THE COURT: You mean you are contending that is a conclusion of the witness?

MR. FRUM: That is correct.

THE COURT: You are offering the answers that you think are competent, relevant, and material testimony?

MR. FRUM: That is correct.

THE COURT: All right. You may read the testimony for the record so I will have it before me.

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24 MR. FRUM: For the defendant, question one:

"You are William S. Jamieson, President of the E. & J. Travel Bureau, Inc., a body corporate, with its principal or head office located at 715 Marin Street, Vallejo, California?

"Answer. Yes, Vice President.

"Question. 2. Were you so on January 25, 1960?

"Answer. No. On January 25th, 1960, James G. Eddy, Jr., was president of E. & J. Travel Bureau, Incorporated.

"Question 3. On January 25, 1960, was the Travis Transportation Company, Incorporated 'doing business as Golden Gate Airways', a successor and assignee of the Travis Air Taxi Service, a body corporate?

"Answer. Yes.

"Question 4. Were you also president of the said Travis Transportation Company, Inc., on January 25, 1960?

25 "Answer. Yes.

"Question 5. At that time was the said Travis Transportation Company, Inc., doing business as Golden Gate Airways, engaged in the commercial taxiing of passengers to and from Travis Air Force Base and San Francisco International Airport, California, air flight as a public carrier?

"Answer. Yes.

"Question 6. If the answer to Question 5 above is 'yes', was such activity under contract with the United States Military Air Transport Service (MATS)?

"Answer. No. Said activity was conducted at Travis Air Force Base under a revocable permit issued to the Travis Air Taxi Service, a body corporate, and a subsidiary of the E. & J. Travel Bureau, Inc., by Charles W. Stark, USAF, Base Commander, Travis Air Force Base, California, on February 27, 1959, amended on that same date to conform to the change of the Carrier's name to read 'Travis Transportation Company, Incorporated, doing business as Golden Gate Airways.'

"Question 7."

As I previously said, Your Honor, we reserve the right to object to and contest the witness' --

26 THE COURT: Don't you concede that? You offered this.

MR. FRUM: We don't concede his answer that it was not a contract, no. We think the document speaks for itself.

THE COURT: I think the document speaks for itself. The answer will have to be taken into consideration with the document itself.

MR. FRUM: (Continuing reading from interrogatories.)

"Question 7. Can you and did you append to your answers to these interrogatories a photostatic or Thermofaxed copy of the instrument under which the said Travis Transportation Company, Inc., was authorized to operate at Travis Air Force Base as an air carrier of passengers for hire?

"Answer. Yes, a copy of our revocable permit and Change No. 1 thereto, dated 27 February 1959, is appended hereto and marked Exhibit 1 of Affiant's."

At this point, Your Honor, I think it is appropriate to introduce that document, if Mr. Leahy has no objection.

THE COURT: All right.

This is a revocable permit that you are offering?

MR. FRUM: Yes, Your Honor. It has both Change No. 1 and Supplement No. 1 to it.

27 THE COURT: All may be marked as Plaintiff's Exhibit No. 4.

(Revocable Permit and Change No. 1 thereto, was marked Plaintiff's Exhibit No. 4 for identification.)

THE COURT: Any objection?

MR. LEAHY: No objection, Your Honor.

THE COURT: Received.

(Plaintiff's Exhibit No. 4, heretofore marked for identification, was received in evidence.)

MR. FRUM: (Reading from Interrogatories.)

"Question 8. On January 25, 1960, did the E. & J. Travel Bureau, Inc., through one of its agents or employees, sell to one Salvatore Messina a taxi flight from Travis Air Force Base, California, to San Francisco International Airport, via Travis Transportation Company, Incorporated?

"Answer. Yes.

"Question 9. If your answer to Question 8 above is 'yes,' can you and did you append to your answers to these interrogatories a photostatic or Thermofaxed copy of the receipt issued to the said Mr. Messina for said trip?

"Answer. No, affiant is unable to positively identify said receipt.

28 "Question 10. If Your answer to question 8 above is 'yes,' please state the amount of the fare for said trip and whether it was prepaid by Mr. Messina or whether it was charged to the government.

"Answer. The fare for the taxi flight to San Francisco International Airport was \$15 and was prepaid by Mr. Messina.

"Question 11. On January 25, 1960, did the E. & J. Travel Bureau, Inc., through one of its agents or employees, sell to one Salvatore Messina an air flight from San Francisco International Airport to Washington, D.C., via United Air Lines, Inc.?

"Answer. Yes.

"Question 12. If your answer to question 11 above is 'yes,' can you and did you append to your answers to these interrogatories a photostatic or Thermofaxed copy of the receipt issued to the said Mr. Messina for the said trip?

"Answer. Yes. Copy appended hereto marked Affiant's Exhibit No. 2."

I believe, Your Honor, that that is already in the file, that Affiant's Exhibit No. 2.

29 THE COURT: Is what?

MR. FRUM: I believe Affiant's Exhibit No. 2, which is a receipt issued to Mr. Messina for his United Air Lines ticket, is already in the file.

THE COURT: It has not been offered in evidence, has it?

MR. FRUM: No, Your Honor. I would like at this time to offer it in evidence.

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MR. LEAHY: No objection, Your Honor.

THE COURT: Received.

(Plaintiff's Exhibit No. 5, heretofore marked for identification, was received in evidence.)

THE COURT: That is a receipt for what?

MR. FRUM: For the United Air Lines flight.

THE COURT: All right, you may proceed.

MR. FRUM: (Continuing reading from interrogatories.)

30 "Question 13. If your answer to question 11 above is 'yes,' please state the amount of the fare for said trip and whether it was prepaid by Mr. Messina or whether it was charged to the government.

"Answer. The fare for the flight from the San Francisco International Airport to Washington, D.C., was \$102.25, and was purchased by GTR, ie., Government Transportation Request."

That is the end of the defendant's questions. The following questions were propounded on behalf of the plaintiff.

"Question 1. Did the E. & J. Travel Bureau, prior to February 29, 1959, have a branch at Travis Air Force Base?

"Answer. Yes.

"Question 2. Was there, prior to February 29, 1959, any air taxi service out of Travis Air Force Base?

"Answer. To the best of my knowledge, no.

"Question 3. Did you, together with other officers of the E. & J. Travel Bureau, establish an air taxi service at Travis Air Force Base in February 1959?

"Answer. Yes.

31 "Question 4. Please describe fully how the establishment of air taxi service at the Travis Air Force Base came about.

"Answer. By application patterned after service previously established at Scott Air Force Base.

"Question 5. Did you, in the course of the negotiations and discussions outlined in your answers to the previous interrogatory, deal with Officers of Military Air Transport Service?

"Answer. Yes."

MR. LEAHY: At this point, Your Honor, I would like to object to the question and the answer just read, inasmuch as it does not refer specifically to any individual.

THE COURT: Which one is this?

MR. FRUM: Number five, Your Honor.

THE COURT: Five? It will be received subject to your objection.

MR. LEAHY: And, moreover, may I point out that it merely refers to the vague generality of dealing --

THE COURT: It doesn't appear, does it, in any of these interrogatories or answers whether Mr. Messina paid personally for the short trip or the government paid for it?

MR. LEAHY: Yes, Your Honor, it was testified by Mr. Jamieson that he paid \$15 in cash for the trip.

32 THE COURT: Whether he was reimbursed for it or not?

MR. LEAHY: There was no mention made of that.

THE COURT: Is there any evidence of that?

MR. FRUM: No, Your Honor, there isn't.

THE COURT: Well, what are the facts about it?

MR. FRUM: Of course, no request was ever put in for reimbursement in view of the outcome.

THE COURT: I see. Well, no request has been put in by the estate for reimbursement?

MR. FRUM: No, Your Honor.

MR. LEAHY: Did Your Honor rule on my latest objection to the vagueness?

THE COURT: I will take it subject to the fact of whether it is connected up in any way.

MR. FRUM: That concludes, Your Honor, the deposition. There is a jurat at the bottom. That is the end of the testimony.

THE COURT: All right.

MR. FRUM: I would next like to offer in evidence, Your Honor, the deposition of Major Robert D. Lichty, United States Air Force, also on written interrogatories. This should be in the file. I think it should be quite close to the previous deposition.

33 THE COURT: All right. You may proceed.

MR. FRUM: For the defendant;

"Question 1. You are Robert D. Lichty, Travis Air Force Base, California?

"Answer. Yes.

"Question 2. Identify your present occupation by naming the service branch of which you are a member and your rank and job classification.

"Answer. United States Air Force, Major, Surface Transportation Officer (Commercial Transportation Officer).

"Question 3. On January 25, 1960, did you occupy that same position?

"Answer. Yes.

"Question 4. As such, did you issue to one Salvatore Messina, Government Transportation Request No. M 6,932,271?

"Answer. My records indicate that one transportation request No. N 6,932,271 was issued to Mr. Messina by one of my transportation agents.

"Question 5. If your answer to Question No. 4 above is 'yes,' please state whether or not the instrument appended hereto and marked Defendant's Exhibit A is a true copy of the contents of the subject transportation request.

34 "Answer. Defendant's Exhibit A is a true copy of subject transportation request.

"Question 6."

Again, Your Honor, this document is in the jacket on the final page of Major Lichty's deposition.

THE COURT: You better detach it.

(Government Transportation Request (Copy) N6,932,271 was marked Plaintiff's Exhibit No. 6 for identification.)

THE COURT: Is there any objection to Plaintiff's Exhibit No. 6?

MR. LEAHY: No, Your Honor.

THE COURT: It will be received.

(Plaintiff's Exhibit No. 6, heretofore marked for identification, was received in evidence.)

THE COURT: That is the request for the United Air Lines Transportation?

MR. FRUM: That is correct, Your Honor.

(Continuing to read interrogatories.)

"Question 6. What airline was the said Government Transportation Request issued to and what point of departure and point of destination was it to cover?

"Answer. United Air Lines, departure point San Francisco, destination Washington, D.C.

35 "Question 7. Was the fare for said trip prepaid by Mr. Messina or was it to be charged to the government?

"Answer. All transportation requests are charged to the government."

That concludes the defendant's questions. The following questions were propounded on behalf of the plaintiff.

"Question 1. Are you, as Commercial Transportation Officer, responsible for the movement of transient military and civilian Department of Defense personnel into and out of the Travis Air Force Base?

"Answer. Commercial Transportation Officer prepares transportation requests and provides travel information to military and civilian personnel transiting this base. We are responsible for providing transportation requests when authorized.

"Question 2. Did Salvatore Messina arrive at Travis Air Force Base on a MATS flight from the Far East on January 25, 1960?

"Answer. I assume that he arrived some time on 25 January 1960; I do not have personal knowledge as to what time or date he arrived on this base.

36 "Question 3. Did he arrive at approximately 8:00 p.m., (PST)?

"Answer. I do not know; I have no personal knowledge.

"Question 4. Was he scheduled to depart from San Francisco International Airport at approximately 10:30 p.m., (PST) on January 25, 1960?

"Answer. To the best of my knowledge, Mr. Messina, upon issuance of transportation request, probably requested a reservation on the next available departure from San Francisco to Washington, D.C., which would have been coach flight 122, which departed some time around 10:30 p.m., 25 January 1960.

"Question 5. Approximately how much time did his processing at Travis Air Force Base require?

"Answer. I do not know; processing usually takes from thirty minutes to one hour.

"Question 6. Is plaintiff's Exhibit No. 1, which is annexed hereto, a true copy of official correspondence between the addressee and the sender?

"Answer. Yes.

"Question 7. Is Plaintiff's Exhibit No. 1 a copy of correspondence which is in your files and under your supervision and control?

37 "Answer. Yes.

"Question 8. Is Plaintiff's Exhibit No. 1 a part of a file which is kept in the ordinary course of business?

"Answer. Yes."

At this point, Your Honor, we would like to offer in evidence the document which is identified in this deposition as Plaintiff's Exhibit No. 1.

MR. LEAHY: I object, Your Honor, on the grounds that the document is both incompetent and irrelevant to any issue in this case. It is incompetent because, as Your Honor can see, it pertains to the opinions of persons who are not present and who are not subject to cross-examination.

It is irrelevant because it has no bearing on any proper issue in this case.

THE COURT: What is your answer to that?

MR. FRUM: In the first place, Your Honor, we aren't necessarily offering it for the opinions therein asserted.

THE COURT: You say you aren't necessarily. Are you offering it in any way for the opinions, because this is part of Mr. Leahy's objection. If you are offering it for opinions, then I would like you to answer his objection.

38 MR. FRUM: We are offering it to show that on February 2nd, 1959, the Commanding Officer of Travis Air Force Base, Colonel Stark, requested permission to institute an air taxi service and set forth in some detail his reasons for requesting such permission.

THE COURT: Well, this was, of course, prior to the unfortunate accident.

MR. FRUM: That is correct, Your Honor.

THE COURT: Was his request granted?

MR. FRUM: Apparently it was, because about three weeks after that --

THE COURT: Was it granted prior to this accident?

MR. FRUM: Yes. About three weeks after that an agreement was entered into between Travis Air Taxi Service and Colonel Stark, acting as Commanding Officer of Travis Air Base.

THE COURT: Well, I won't take the time to read this letter at this time. It is quite lengthy. I will take it subject to your objection, Mr. Leahy, and determine, when I take the case under advisement, whether it should be considered by the Court in deciding this case.

I will receive it subject to your objection.

(Travis Air Force Base request of February 2, 1959, for Travis Passenger Air Taxi Service, was marked Plaintiff's Exhibit No. 7 and received in evidence.)

39 MR. FRUM: (Continuing reading interrogatories:)

"Question 9. Is the surface-transportation availability, which is described in Plaintiff's Exhibit No. 1, substantially the same as that which existed on January 25, 1960?

"Answer. Approximately the same, Vaca Valley Volkswagon no longer exists. U-Drive cars are available.

"Question 10. Are you aware that Travis Air Service began an air taxi service from Travis Air Force Base to San Francisco International Airport in February 1959?

"Answer. Yes.

"Question 11. Does the existence of air taxi service to Travis Air Force Base ameliorate the problem attended upon the movement of passengers to commercial airports in the area?

"Answer. Although air taxi service is no longer available, it did, of course, supplement and speed up the movement of passengers to commercial airports. It was useable at government expense by many persons whose orders contained specific authorizations for the use of air taxi or to anyone willing to pay the cash fare from his own resources."

40 MR. FRUM: That concludes Major Lichty's deposition on written interrogatories.

At this time, Your Honor, I would like to offer in evidence the air taxi operator's certificate issued to Travis Transportation, Incorporated, doing business as Travis Air Service, and Golden Gate Airways. This was identified at pre-trial as Plaintiff's Exhibit.

THE COURT: Is that in here, too?

MR. FRUM: No, Your Honor, I have that here.

(Air taxi operator's certificate dated Sept. 29, 1959, was marked Plaintiff's Exhibit No. 8 for identification.)

THE COURT: It will be received as long as it was stipulated at pre-trial.

(Plaintiff's Exhibit 8, heretofore marked for identification, was received in evidence.)

MR. LEAHY: No objection, Your Honor.

MR. FRUM: Now, in connection with this document, Your Honor,
41 I think some explanation is needed, because on its face it says that it will remain in force until the expiration date of Special Air Regulation SR-395 A.

Now, that particular regulation expired in July of 1963, and I will refer the Court to the section of the Federal Register which so provides.

* * *
42 MR. FRUM: The citation to the Federal Register is Volume 28, page 7158 and the date of this issue of the Federal Register is July 12, 1963.

* * *
MR. FRUM: This is identified as Reg. Docket 1835; Reg. No. SR-395 B and it is entitled Part 42-A -- certification and operation rules for commercial operators and air taxi operators; small aircraft.

And also Part 45 -- Commercial operator certification and operation rules.

And the subhead is Miscellaneous Amendments.

Now, there are several amendments in here, Your Honor, but the one to which we refer is at the bottom of this particular order.

It states in paragraph No. 2:

"Special Regulation 395-A of the Civil Air Regulations is rescinded."

43 MR. LEAHY: Yes, I object to it, Your Honor, on the grounds that there has been no proper foundation laid for it, and it completely takes me by surprise.

THE COURT: This is a public document of which the Court can take judicial notice, can't it?

MR. FRUM: That is correct, Your Honor. * * *

44 THE COURT: * * * The regulation wasn't stipulated to but the Court can take judicial notice of it. * * *

MR. FRUM: This is also in the file, Your Honor. This is the deposition of Lieutenant General Joe W. Kelly.

45 THE COURT: Deposition or interrogatory?

MR. FRUM: Upon written interrogatories.

THE COURT: I have it. All right.

MR. FRUM: This is for the defendant:

"Question 1. You are Joe W. Kelly, Jr., Lieutenant General, USAF, Commander, Military Air Transport Service, (MATS), USAF, Headquarters, Scott Air Force Base, Illinois?

"Answer. Yes.

"Question 2. Please state the relationship of the Military Air Transport Service (MATS), of the United States to the United States Air Force.

"Answer. The Military Air Transport Service (MATS) is one of the several major commands of the United States Air Force.

"Question 3. Please state the functions of the Military Air Transport Service (MATS) at Travis Air Force Base, California, on January 25, 1960.

"Answer. On that date and for some time prior thereto, MATS performed a dual function at Travis Air Force Base. First, it shared the base with other commands of the United States Air Force such as SAC, ADC, et cetera, in fulfilling its own basic purpose which is to
46 comprise the nation's only strategic air force. Second, MATS was assigned the maintenance or housekeeping responsibilities on the base.

"Question 4. Please identify any orders that purported to authorize Charles W. Stark, Colonel, USAF, Commander, Travis Air Force Base, California, to bind the Military Air Transport Service (MATS), USAF, in contract for intrastate aircraft passenger flights prior to January 25, 1960.

"Answer. The said Commander was not authorized to bind the Military Air Transport Service (MATS) in contract for any such flights and he did not enter into any such contracts as far as this Command is aware."

That answer, Your Honor, we would reserve the objection to contest General Kelly's opinion.

THE COURT: I will receive it subject to your objection.

MR. FRUM: (Continuing reading interrogatories:)

"Question 5. If your answer to Question No. 4 above admits of any such authorization, can you and did you append to your answers hereto, marked 'Affiant's Exhibit A,' a true copy of such purported authorization?

"Answer. No such authorization existed."

47 Again, the same objection or reservation, Your Honor.

"Question 6. Please state whether or not the flight of the twin-engine Piper-Apache plane, operated by the Travis Transportation Company, doing business as Golden Gate Airways, which crashed on 25 January 1960, while en route from Travis Air Force Base, California, to San Francisco International Airport, California, was one by or contracted for, by the Military Air Transport Service (MATS) of the United States.

"Answer. No."

Again, the same reservation, Your Honor.

THE COURT: Of course, you don't claim any actual contract, written contract?

MR. FRUM: Yes. We claim this flight was under contract.

THE COURT: On a written contract?

MR. FRUM: Yes, Your Honor.

THE COURT: Do you have such a contract?

MR. FRUM: Well, we claim that the revocable permit --

THE COURT: That is what your claim is, the contract?

MR. FRUM: Yes, that's right, Your Honor.

48 THE COURT: You claim he is wrong in his answer in interpreting this permit as not being a contract?

MR. FRUM: Yes, because this question is really, I think, the question this Court is going to have to decide and I don't believe it is within General Kelly's province to answer it.

THE COURT: All right.

MR. FRUM: (Continuing reading interrogatories:)

"Question 7. Please state the distinction between airlift contracted for by MATS compared to the operation of an air-taxi service conducted by a commercial carrier to and from the Travis Air Force Base pursuant to a revocable permit issued by the said Travis Air Force Base Commander.

"Answer. A. Airlift contracted by and for MATS is air transportation service furnished by a commercial carrier pursuant to a contract between the carrier and the U. S. Government, represented by MATS as an airlift service agency for the Department of Defense. The contract defines the terms of service to be provided and the price to be paid therefor by the government.

"Paragraph B. A revocable permit is a mere license granted by a Commander of an Air Force Base for operation of air-taxi service and
49 constitutes written authorization (granted in accordance with appropri-

ate Air Force Regulations) for a named individual, corporation, or partnership, to land aircraft on an Air Force Base and take off therefrom, and to make certain specified and limited use of other facilities on the Base in connection with operation of air-taxi service. The government does not incur any obligation as a result of granting such a license, and the licensee is not obligated by such a license to furnish any service to the government."

Again, of course, we reserve our right to contest the General Kelly's characterization of this revocable permit, what he calls a revocable permit.

That concludes the questions for the defendant.

The following questions were propounded on behalf of the plaintiff:

"Question 1. Is your Headquarters aware that the Commanding Officer of Travis Air Force Base arranged for air-taxi service there on February 29, 1959?

"Answer. A revocable permit dated 27 February 1958 and approved by Colonel W. Stark, USAF, Commander, was issued for air-taxi service at Travis Air Force Base.

50 "Question 2. Is it true that Scott Air Force Base had arranged for air-taxi service prior to February 29, 1959?

"Answer. Yes, air-taxi service was authorized at Scott Air Force Base 26 August 1958.

"Question 3. Are there any other Air Force Bases under your command that have arrangement for air-taxi service?

"Answer. No.

"Question 4. If your answer to the preceding interrogatory is 'yes,' give the names of those bases.

"Answer. No answer necessary.

"Question 5. Is it true that air-taxi service at these installations, including Travis Air Force Base, was initiated in order to facilitate and expedite the transportation of large numbers of persons to nearby commercial airports?

"Answer. The term 'large numbers of persons' is a relative matter which must be defined. The basic purpose of air-taxi service is to expedite the transport of official passenger travel on official business to connect with commercial airlines.

"Question 6. Was Travis Air Force Base, on February 29, 1959, a MATS installation?

51 "Answer. Yes. Travis Air Force Base was transferred from SAC to MATS effective 1 July 1958.

"Question 7. Was the Commanding Officer of Travis Air Force Base, on that date, under the command of the Commanding General, MATS?

"Answer. Yes. MATS assumed command one July 1958.

"Question 8. Was the 5th Air Base Group, at Travis Air Force Base, on February 2, 1959, a MATS organization?

"Answer. Yes, the 5th Air Base Group was relieved by SAC and assigned to MATS effective 1 July 1958.

"Question 9. Was the 5th Air Base Group, on March 2, 1959, redesignated the 1501st Air Base Group by MATS General Order 17?

"Answer. No, General Order No. 17 inactivated the 5th Air Base Group effective 8 April 1959 by authority of Department of the Air Force letter AFOMO 87 M, 12 February 1959. Effective the same date, 8 April 1959, the 1501st Air Base Group was activated and designated by Commander, MATS.

"Question 10. Is the 1501st Air Base Group a MATS organization?

"Answer. Yes, since its activation and designation, 8 April 1959."

52 That concludes the deposition on written interrogatories of Lieutenant Colonel Joe W. Kelly.

THE COURT: Is there going to be any evidence before the case concludes as to whether, if decedent had lived and made request for reimbursement, if they paid for this short trip, made request to the government, the government would reimburse him for this?

MR. FRUM: No, Your Honor, there isn't.

THE COURT: Isn't this an important consideration as to whether it was a continuous flight or not?

MR. FRUM: We don't think it is important because of the fact that if the contract here at issue, namely, the insurance policy was taken, was between Mr. Messina and a private company, namely, the insurance company. Suppose, for example, Mr. Messina's orders had only authorized transportation to San Francisco and he had continued to Washington at his own expense. If he had bought an insurance policy which insured him for the trip from Tachikawa to Washington, there isn't any question he would be covered from San Francisco to Washington, no matter who paid for it, and that is why we don't think it is important.

At this time I would like to call Major Robert Kendall to the stand.

53 Thereupon,

ROBERT L. KENDALL

called as a witness on behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FRUM:

Q. Major Kendall, will you state your full name, please? A.

Robert Leonard Kendall.

Q. And you are a major in the United States Air Force? A. I am.

Q. How long have you been in the Air Force? A. On active duty, over sixteen years, total approximately twenty-three.

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Q. Are you a pilot, sir? A. No, sir, I am not.

Q. Have your duties in the Air Force been of an administrative nature? A. An administrative nature and personnel; yes, sir.

Q. How many years, approximately, have you spent in personnel
54 work? A. Approximately ten years.

Q. What is your current assignment? A. I am Chief of the Officer

Status Analysis Branch, Military Records Division for the United States Air Force.

Q. In this capacity, do you have custody of the records of Colonel Charles W. Stark, U. S. Air Force, retired? A. I do.

Q. And did you bring those records with you? A. Yes, sir, I did.

Q. Is this an official record of the United States Air Force? A. It is.

Q. Major, does a part of that record show the assignments or the billets to which Colonel Stark was assigned during his career as an Air Force Officer? A. Yes, sir, the Air Force Form 11 does.

Q. And this is a part of the official records under your custody and control, is it not? A. It is.

MR. FRUM: I would like to offer this in evidence, Your Honor.

THE COURT: Coming back to my previous question, counsel, the thought I had in mind, I probably didn't make myself clear, this is probably a matter you will be arguing out orally and in your briefs, anyway, this disputed provision in the policy which is involved here, and upon which you rely is that this is a contract made by the Military Air Transport Service, MATS.

The question in my mind was whether it might not be a consideration in determining whether this was a MATS flight, whether the government took the position that the decedent should pay for this himself upon request being made to the government, or it should be paid for by the government.

An interpretation of this provision of the insurance policy as to whether it was a continuous MATS flight, this is the problem that was in my mind when I asked this question.

MR. FRUM: Well, we will look into the matter, Your Honor, but, as I said before, under the revocable permit it states that some of the people traveling on this line may be traveling at government expense.

THE COURT: But you have to rely upon this contract of insurance, the language in the contract of insurance, whether it was a MATS flight,

and that is the question that was disturbing me, whether, if the government took the position it wasn't paying for this short flight, that that
56 was the responsibility of the decedent, whether the government was considering this not apart of the MATS flight but an independent flight by the decedent himself.

Well, you may proceed. You can argue that point later.

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57 MR. FRUM: Yes. The only difference is, there is a change in a code number and perhaps Major Kendall can explain that.

THE WITNESS: Well, I frankly cannot recall the dates involved here. We have within the Air Force structure what we call a primary AFSC, meaning Air Force Specialty Code.

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58 THE COURT: As long as we are trying this without a jury and the procedure is somewhat informal, I would like to have you keep in mind, counsel on both sides, this additional question in connection with the previous question I asked of you about the matter of payment of fare on this flight, this short flight. I haven't had a chance to study carefully this revocable permit and compare it with the contract between MATS and the United Air Lines to determine whether there is any difference in the safety regulations on the United Air Lines flights and MATS and on this short flight.

This is the thing, too, that I think you should keep in mind and present to the Court at the proper time.

59 Q. Major Kendall, can you say from looking at that record whether, in February of 1959, Colonel Stark was a MATS Officer? A. Yes, sir, I can.

Q. And you would say that he was a MATS Officer? A. He was, yes, sir.

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Q. Major Kendall, is there in your records a document which is part of the official record of the Air Force describing the duties of

Colonel Stark covering the period which includes February 1959? A.

Yes, sir, there is.

Q. And is this document, which is identified as AF Form 77, USAF, Officer effective in this report, is that part of the official records of the
60 U. S. Air Force? A. It is.

Q. And that is part of the records under your custody and control?

A. It is.

MR. FRUM: I would like to offer this document in evidence, Your Honor.

(AF Form 77 for Charles W. Stark was marked Plaintiff's Exhibit No. 11 for identification.)

MR. LEAHY: Your Honor, it is going to take about five minutes to cover this.

THE COURT: Go ahead, look it over.

(Brief Pause.)

THE COURT: Is there any objection to this?

MR. LEAHY: I would like to explain that I have no general objection to this being admitted. I am sure Your Honor will agree with me, however, that only parts of it are admissible, since only parts of it are relevant or could possibly be relevant. Much of it is incompetent since it is the opinion, obviously, of one general who isn't here, and I might also suggest to Your Honor that this is a performance rating sheet to a great extent which I am sure no one would want aired even in open court.

THE COURT: We have two sides to the coin.

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61 THE COURT: Plaintiff is making objection to the opinion you got on interrogatory from an officer on the ground that it is an opinion, and now you are making the same objection to an opinion, so both sides apparently are making similar objections.

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THE COURT: And you are now making the same objection on the

other side of the coin, that it is an opinion. At any rate, I won't read it now.

I will receive it subject to your objection.

(Plaintiff's Exhibit 11, heretofore marked for identification, was received in evidence.)

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62 Q. And I would like to have Major Kendall interpret for us exactly what is meant by the words "tenant units." A. Well, I believe the best way I could explain it is this: Every Base, of course the Base itself is what we refer to as the host Base. But in many of our Bases in the Air Force, we also have tenant units, as we refer to them, on this Base,
63 which have activities on this Base, although it does not actually belong to them.

They enter into an agreement with the host Base that their activities will be located on this Base, and, as I say, the best word I can use is the word I am used to and that is tenant on the Base, and then it is up to the host Base to furnish what we consider or classify as all the support activities for all of the tenants and tenant units that are housed on that Base or the activities on that Base.

Q. From the records that you have under your custody, can you tell us who was the host at Travis Air Force Base at this time? A. Which specific time are you referring to?

Q. I am referring now to February 1959, which is the period covered by this report, if you would like to look at it again. A. Of course, in February 1959, as I believe the record will show, it was then called the 5th Air Force Base and later it was designated the 1501st Air Base Group. The Air Base Group at Travis Field was the host organization.

[Cross by Mr. Leahy]

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65 Q. I see. Now, before Colonel Stark was assigned to MATS on July 1, 1958, to which command had he been assigned? A. He was in the MATS command between the period 16 June 1958 to 1 July 1958.

Q. Would you tell us, please, Major, what change took place between June and July with respect to Colonel Stark? A. The record shows that when he was initially assigned there he was assigned as Special Assistant to the Commander of the 1501st Air Transport Wing at Travis. On 1 July 1958, approximately 15 days later, he was made the Base Commander, Headquarters 5th Air Base Group, Travis Air Force Base.

* * *

66 Q. I see. You are not personally familiar with the previous assignee of Travis Air Force Base, are you? A. Prior to '59?

Q. Prior to it becoming a MATS host. A. Only from the standpoint of my knowledge, I was personally assigned through there, going and coming.

Q. When was that? A. I departed in 1954 and returned in 1956.

Q. Who was the host at that time? A. To the best of my recollection, SAC. It was a SAC Base at that time.

Q. Now, Major, you can help us in this respect, I am sure: The United States Air Force is comprised of various arms, is it not, called Commands? A. Yes, sir.

Q. Would you tell us, roughly, how many Commands there are? A. 67 I am estimating, sir, because they sometimes change. It sticks in my mind that we have approximately twelve.

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68 Q. You testified at that time that SAC was there and ADC and ATC, correct, as well as MATS? A. Yes, I believe those were the commands. It is mentioned in there.

* * *

70 Q. Would you agree with a similar definition going something like this: That the host organization is charged with the various housekeeping chores of the Base? A. Yes, it is.

Q. And some of these housekeeping chores, I gather, include making arrangements for the collection of trash and for provisions for food

and the necessities of life as well as transportation in and out; is that correct? A. Yes, sir.

Q. All right. And, therefore, in 1959, as a matter of fact, from July 1, 1958, it was MATS which was given the responsibilities of performing these various chores, correct? A. In July 1958, sir?

Q. Yes. A. That is correct.

Q. And, previously, these same chores had been performed by another major command of the United States Air Force, namely, SAC, the Strategic Air Command; is that correct? A. Immediately prior thereto; yes, sir.

Q. All right. Now, what is the primary official function of MATS, the Military Air Transport Service of the United States Air Force? A. This, I am not qualified to give you an official definition of, sir. I do
71 not know of my own knowledge what the actual mission, in black and white, is for MATS. I can only give you my personal knowledge having used the facilities myself.

Q. Yes. Well, from your own personal knowledge, is it not the command that is charged with the transportation of men and materiel for the United States Air Force? A. I would say that is part of it. I would not know whether that was all-inclusive or not.

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73 Q. I am trying to get from you the identity of the 5th Air Base Group. You referred to it yourself. A. Oh, in this particular case the record reflects the 5th Air Base Group is a MATS Air Base organization. MATS is the major command.

Q. It, then, was the name and style of the MATS command at that
74 time for the performance of these chores; is that correct? A. That is correct.

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76 Your Honor, on the insurance policy which I believe is Plaintiff's Exhibit No. 1, Mr. Leahy and I had discussed the fact that the postmark on that, which is identified simply as Army Air Force Post Office, I

believe it is 323, that is on the back side, that that is a postmark of the Tachikawa Air Force Base in Japan.

THE COURT: Is that correct?

77 MR. LEAHY: That is correct, Your Honor.

THE COURT: All right. The record may so indicate.

MR. FRUM: Your Honor, we have one more exhibit we would like to put in evidence. This was identified as Plaintiff's pre-trial Exhibit No. 9 and is a letter from Mutual Benefit, Health and Accident Association to Mr. L. Harold Sothoron, who was at that time an attorney representing Mrs. Messina, the plaintiff.

(Mutual of Omaha Letter dated March 16, 1960 was marked Plaintiff's Exhibit No. 12 for identification.)

MR. FRUM: This document was stipulated at pre-trial, Your Honor.

THE COURT: It will be received.

MR. LEAHY: No objection, Your Honor.

(Plaintiff's Exhibit 12, heretofore marked for identification, was received in evidence.)

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80 THE COURT: You may proceed.

MR. FRUM: We have obtained the pertinent regulations covering the question of whether Mr. Messina would or would not have been reimbursed for the \$15 taxi fare.

We have asked, since the regulations don't answer this question clearly, we asked both the Department of the Army and the General Accounting Office for an opinion on this, and we were told by both offices that they would not render an opinion unless an actual request was presented to them for the \$15.

In other words, they would not render an advisory opinion. Accordingly, we are able to produce the regulations but not a ruling or an interpretation of them.

I would like to call Miss Howarth to the stand.

THE COURT: You haven't offered these regulations in evidence as yet.

MR. FRUM: We are about to by means of Miss Howarth, Your Honor.

Thereupon,

CAROLYN W. HOWARTH

called as a witness on behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

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DIRECT EXAMINATION

BY MR. FRUM:

Q. Would you state your full name, please? A. My name is Carolyn Wells Howarth.

Q. And by whom are you employed? A. U. S. General Accounting Office.

Q. What is the title of your position? A. I am Unit Head of Records, Information Unit.

Q. And in this capacity do you have custody of the Army Department Civilian Personnel Regulations, T3 Volume, this volume here?

A. Not actual, physical custody. They are volumes which are in file in the Library, the Legal Library of the U. S. Accounting Office.

Q. Is this a record kept -- A. It is a record maintained by the GAO, yes, sir.

Q. And with respect to the Army Department Regulations 55-355, is this also a record kept by the GAO? A. Yes, sir. These are original books and the only copies that we have.

MR. FRUM: Your Honor, I would like to offer these in evidence. I have marked the pages we consider to be pertinent and have made photo copies. Mr. Leahy has a set of photo copies.

82 (Copy of Civilian Travel Regulations CPR T3, Revised 18 June 1959, marked Plaintiff's Exhibit No. 13 for identification.)

MR. LEAHY: I object to the introduction of these records into evidence, Your Honor, on the ground that no proper foundation has been laid for them under the Federal Shop Book Rule.

THE COURT: In what respect do you claim there is lack of foundation, Mr. Leahy?

MR. LEAHY: I was about to say that this witness has admitted these records are not in her custody and, therefore, she is not in a position to testify as to their admissibility under the Federal Shop Book Rule.

THE WITNESS: May I speak, Your Honor?

THE COURT: Yes, go ahead.

THE WITNESS: The Records Information Unit of the GAO, of which I am head, comes directly under Mr. Allen M. Humphrey, who is custodian of all original documents in the General Accounting Office.

THE COURT: Are you under his supervision?

THE WITNESS: I am, and came here under his direction, Your Honor.

THE COURT: Can you testify that these are part of the regular records?

THE WITNESS: Sir, I took them out of the Library, myself and signed the slips for them to borrow them.

83 THE COURT: These are the regular records kept in the course of governmental business in connection with these transactions?

THE WITNESS: Yes, Your Honor.

THE COURT: All right. They will be received.

(Plaintiff's Exhibit 13, heretofore marked for identification, was received in evidence.)

MR. LEAHY: I would like the record to show, according to the witness' own testimony, these records are kept by others and the only manner in which they came to her attention was through their being transmitted to the Library, of which she is a part.

THE COURT: They will be received.

Are you offering all these I have before me now?

MR. FRUM: Yes, Your Honor, all but the final page are parts of CPR T3.

THE COURT: Which part, specifically, of this exhibit do you think is relevant here?

MR. FRUM: On the second to the last page of the mimeographed sheets, which is page 30, in the lefthand column, about two-thirds of the way down, is a statement regarding air taxi service.

84 It states: "Air taxi service may be secured in accordance with AR 55-355."

A copy of the pertinent part of that regulation is the final page of the mimeographed material; in the right-hand column of that page there is a paragraph regarding air taxi service.

THE COURT: What is AR 55-355? Where is that?

MR. FRUM: That is the final page of the mimeographed material, Your Honor. It is part of an Army Regulation.

THE COURT: No, the number, AR 55-355.

MR. FRUM: It is in the upper right-hand corner.

THE COURT: Yes, I see it. Which part do you have reference to?

MR. FRUM: Paragraph 304011, which is entitled Air Taxi Service.

THE COURT: And which part of that?

MR. FRUM: Well, it states -- the Regulation states that the services of air taxi operators, and I am quoting -- who offer such service in accordance with published rates may be utilized for the transportation of personnel -- and then there are several conditions listed, and the one I understand the facts as we know them, seems to be the one that would apply here, seems to be number two, which says: There is
85 no surface carrier authorized to render the transportation or the services of authorized surface carriers are inadequate; or --.

THE COURT: You are not relying on No. 3, I take it. You very well cannot rely on No. 3 because you don't maintain that a statement was included in the orders that such service was authorized or approved as advantageous to the government.

MR. FRUM: That is true, Your Honor.

THE COURT: There isn't any evidence on that, so you can't rely upon three.

MR. FRUM: That is correct, Your Honor.

THE COURT: And you can't rely on Emergency, No. 1.

MR. FRUM: No.

THE COURT: So you have to rely on No. 2. Where is there any evidence of that in this case?

MR. FRUM: The request of Colonel Stark in February 1959 for the institution of air taxi service at Travis Air Force Base indicates the inaccuracy of the existing service --

THE COURT: It may indicate inadequacy, but does that indicate there was no surface carrier authorized to render transportation services of an authorized surface carrier or that they are inadequate, where is there any evidence of that?

86 MR. FRUM: The evidence would be in Colonel Stark's letter.

THE COURT: That wouldn't indicate there was no service authorized.

MR. FRUM: I would say, however, it was felt there was inadequacy in the existing transportation, which is an alternative.

THE COURT: Might it not indicate that he wanted the services of both types available, both available types rather than inadequacy?

MR. FRUM: Well, I think reading the document as a whole, Your Honor --

THE COURT: Show me what part of the document that you think would indicate by him that surface transportation was inadequate.

MR. FRUM: The opening line of paragraph one, Your Honor, of this letter of Colonel Stark's states:

"The existing surface transportation services at Travis Air Force Base are not considered adequate to meet the demands of present-day travel requirements."

And then it goes on to discuss in some detail --

THE COURT: All right.

MR. FRUM: I should also like to point out, in all fairness, Your Honor, that subparagraph B of the paragraph of the Army Regulations, 87 to which I have referred, states that air taxi service will be procured by government transportation requests.

Now, it is admitted, or it is well indicated that it was not procured by government transportation request, it was procured, rather, by cash payment of the deceased.

However, there is another provision of the travel regulations which were in effect then, and this is on page 31, which is the fourth page of the mimeographed material, and it is the paragraph entitled Transportation Requests.

THE COURT: Page 31?

MR. FRUM: This is page 31 of CPR T3.

THE COURT: When the cost is \$15 or less the traveler may either pay cash for such transportation or be issued a transportation request.

MR. FRUM: Yes.

THE COURT: Was this \$15 or less?

MR. FRUM: This was exactly \$15.

THE COURT: Does the evidence show that?

MR. FRUM: Yes, Your Honor.

THE COURT: All right.

MR. FRUM: Those are the major parts of the regulations which we consider pertinent. There are regulations governing the use of taxicabs. The word taxicab is not defined. However, persons traveling 88 under government orders are permitted to use taxicabs, and this is by paragraph 3-3 which begins on page 26 of CPR T3, and carries over to page 26.1.

THE COURT: What is your comment on that?

MR. FRUM: I think it indicates that at least by analogy one is permitted to travel from one airport to another by a taxicab, and that this might be taken into consideration if the government was determining whether or not an air taxi was authorized.

THE COURT: I didn't hear the last statement.

MR. FRUM: In the government's determination as to whether reimbursement for air taxi services was authorized, it might be taken into consideration that the person would have been allowed to take a taxi.

THE COURT: Was unauthorized?

MR. FRUM: Was authorized.

THE COURT: I don't get the point there.

MR. FRUM: If the Army were considering whether or not to pay this \$15, they might take into consideration the fact that Mr. Messina, one of the alternate means of transportation, which apparently would have been authorized, was a taxicab.

THE COURT: You mean they might have denied the request?

89 MR. FRUM: They might have granted it on the ground that a taxicab would have to go some 60 miles and would have cost as much money.

THE COURT: Or they might have denied it on the ground that it might have cost less?

MR. FRUM: That is correct, Your Honor. This is something we don't have any evidence on, but it is something that could be taken into consideration.

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90 MR. LEAHY: Your Honor, I thought the purpose of the witness on the stand was to offer testimony with reference to these regulations.

THE COURT: The Court is glad to get any information possible, Mr. Leahy, to assist it in arriving at a fair conclusion in this case. Counsel does not offer evidence the Court has the responsibility sua sponte to suggest evidence which the Court feels is necessary, pertinent, and relevant in order to assist him in arriving at a fair and just decision.

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CROSS-EXAMINATION

BY MR. LEAHY:

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92 Q. Mrs. Howarth, you are not familiar with the facts in this case, are you? A. No, sir.

Q. You therefore are not in a position to testify as to the reimbursability of this particular outlay in accordance with these regulations that you brought down here this morning, are you? A. No, sir.

Q. You do not pass upon such questions for reimbursement, yourself, do you? A. No, sir.

Q. I thank you.

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93 MR. LEAHY: Before you pass on to another document, may I make another motion, that this document which Your Honor just received in evidence, the six pages of CPR T3, the seven pages, be stricken from the record for the reason I indicated yesterday. This document comes--

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94 MR. LEAHY: These documents, these seven pages of CPR T3 come as a complete surprise. There is no foundation laid for any such evidence in the pleadings. There is no reference made to any such documents in the pre-trial order. They weren't actually offered by the plaintiff nor was any attempt made by the plaintiff to introduce them until in the course of the trial at Your Honor's suggestion this theory came up, and I am not in a position, upon two or three minutes' inspection of these documents, to become familiar with them.

I am not in a position to determine whether or not any rebuttal evidence of any kind is appropriate, and I think they are clearly an imposition on the defendant in this case, and for the various reasons I have stated, should not be admitted.

THE COURT: If after plaintiff has submitted his brief in ten days and you submitted your brief in ten days you wish to offer rebuttal testimony, I will accept any rebuttal testimony I consider pertinent.

The motion will be denied.

Is that clear to you, Mr. Leahy? If after you have read Plaintiff's
95 brief and you had a chance to study it and submit your brief within ten
days you wish to offer any rebuttal testimony on this phase of the case,
I will be glad to convene the trial, bring the parties together, and give
you the opportunity to do so.

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THE COURT: Mr. Leahy, you were complaining about surprise and
the inability to present rebuttal testimony. I was just giving you the
offer to present any rebuttal testimony you have to offer after the briefs
have been submitted.

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MR. FRUM: We have one further document to offer, Your Honor,
and this is a document which we obtained from Travis Air Force Base.
It just arrived last night and was certified by a representative of the
Secretary of the Air Force in order to be presented in court.

96 It is a copy of a flight manifest which shows the flight which Mr.
Messina made from Tachikawa Air Force Base in Japan to Travis Air
Force Base in California. The flight immediately preceding his fatal
flight.

The flight manifest is a list of passengers and also a description of
the aircraft and airline operating the aircraft.

Because of certain abbreviations and symbols used, it is necessary
for a translation to be made and such a translation --

THE COURT: What is the purpose of this exhibit? Has this ref-
erence to the originating flight?

MR. FRUM: That's right. We wanted to show, Your Honor, the
nature of the flight on which Mr. Messina embarked initially after buy-
ing his policy. We believe this is important in the entire picture.

THE COURT: Why is it important?

MR. FRUM: Because when he purchased this insurance policy he
boarded a flight which was clearly, I think, within the terms of the
policy.

THE COURT: Counsel has conceded that. Mr. Leahy has conceded that the original flight and the United flight would be within the terms of the policy, so why clutter the record with this exhibit, as long as it is
97 the policy, so why clutter the record with this exhibit, as long as it is conceded, as I understand it. Isn't that correct, Mr. Leahy? Did I misunderstand from the beginning that you were not disputing the fact that the original flight and the United Air Lines flight would come within the terms of the policy?

MR. LEAHY: You are correct, Your Honor.

MR. LEAHY: At this time I wish to repeat the defendant's motion for judgment in favor of the defendant for the reasons stated yesterday and for the additional reasons stated a few moments ago with respect to this new evidence that was introduced this morning, namely, the CPR T3 documents.

98 THE COURT: Motion will be denied.

112 MR. LEAHY: Thank you. May it please Your Honor: The defendant at this stage wishes to move the Court to dismiss the case and to
113 enter a judgment in behalf of the defendant for the reasons that the plaintiff has not made out a prima facie case and has not borne the burden of proof which is this: * * *

119 THE COURT: I say that decedent would come within the third priority, would it not, Mr. Leahy? All Department of Defense personnel, including contract employees and dependents thereof.

MR. LEAHY: Yes, I would think so.

146 THE COURT: Assuming further arguendo, which doesn't yet appear in the evidence, that if upon request he would have been paid for this short hop if his request were presented to the Government, could he not assume that MATS was a part of the furnishing of the transportation, contracting transportation as a layman?

MR. LEAHY: No, I don't think so.

THE COURT: Why not?

147 MR. LEAHY: Because this is simple language. If there was any doubt about it, he was at liberty to inquire of the agent of the insuror who sold him this policy. He could have asked specifically if his contemplated air taxi flight in San Francisco came within the coverage of this policy and he would have been told No, it was not, but that for a few additional dollars he could obtain broader coverage that would include such flight, and that is all the insuror would have owed him morally or legally.

*

*

*

PLAINTIFF'S EXHIBIT NO. 1

This Policy Is Nonrenewable and Provides Benefits for Loss of Life, Limb or Sight
and Other Specified Losses Resulting from Accidental Bodily Injuries Received
While a Passenger on Scheduled Airlines and Other Specified Conveyances
or While on the Premises of an Airport to the Extent Herein Provided.

Assessment Association

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION

OMAHA, NEBRASKA

(Herein called the Association)

SCHEDULE Policy T6AV N° 18228 A

(PLEASE PRINT)

Insured's Name SALVATORE H. MESSINA

Street 4103 - 41 ST. City BRENTWOOD State MD

Beneficiary's Name JOSEPHINE L. MESSINA

Street SAME City WASHINGTON State DC ☒ And ☐ Return

Point of Departure TAC Destination WASHINGTON Premium \$4.00

Principal Sum \$50,000 Effective Date 25 Jan. 60

In consideration of the payment of the premium shown in the Schedule, the Association, subject to the provisions, limitations and exceptions of this policy, hereby insures the person named as Insured in the Schedule against loss of life, limb or sight and other specified losses resulting, independently of all other causes, from injuries. The term "injuries" wherever used in this policy, shall mean accidental bodily injuries received during any portion of the first one way or round trip which is made by the Insured, while this policy is in force, between the Point of Departure and the Destination designated in the Schedule and for which the Insured has purchased a transportation ticket or has been issued a pass; provided such injuries are received (1) while riding as a passenger in, boarding or alighting from, or by being struck by an aircraft operated on a regular, special or chartered flight (a) by a scheduled airline of United States Registry holding a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board of United States of America or its successors, (b) by an intrastate scheduled airline of United States Registry maintaining regular published schedules and licensed for the transportation of passengers by a duly constituted authority having jurisdiction over civil aviation in the state in which said airline operates, (c) by a scheduled airline of foreign registry maintaining regular published schedules and licensed for transportation of passengers by the duly constituted governmental authority having jurisdiction over civil aviation in the country of registry of such airline, (d) by, or contracted for by, the Military Air Transport Service (MATS) of the United

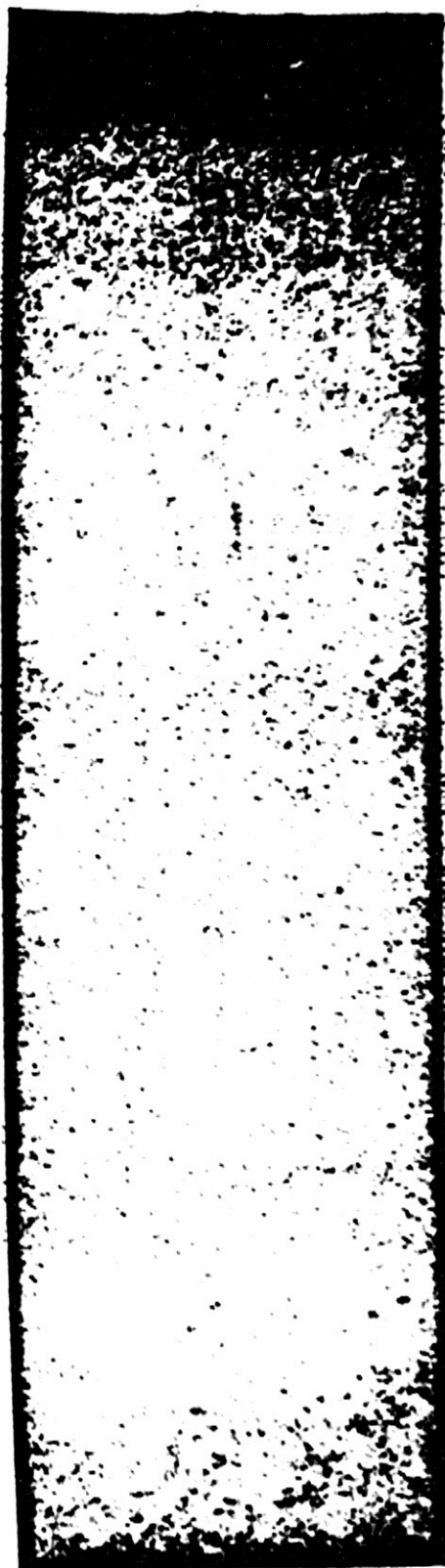
Form T6AV - Series 597S

States, (e) by the Royal Canadian Air Force Air Transport Command or the Royal Air Force Air Transport Command of Great Britain, or (f) by the 315th or 322nd Air Divisions or the 5060th Transportation Squadron of the United States Air Force; or (2) while in or upon any premises or surface vehicle used for passengers and provided or arranged for by such airline or the authorities controlling an established airport, but only while the Insured is in or upon such premises or surface vehicle for the purpose of beginning, continuing or completing the airtrip designated in the Schedule.

Specific Loss Benefits. When covered injuries shall result in any of the following specific losses within one hundred days from the date of the accident, the Association will pay for loss of:

Life.....	The Principal Sum
Both Feet or Both Hands or Both Eyes.....	The Principal Sum
One Hand and One Foot.....	The Principal Sum
One Hand and One Eye or One Foot and One Eye.....	The Principal Sum
One Hand or One Foot or One Eye.....	One-half Principal Sum

Loss of hand or hands, or foot or feet, shall mean severance through or above the wrist-joint or ankle-joint, respectively. Loss of eye or eyes shall mean the total and irrecoverable loss of the entire sight thereof. Only one of the amounts (the largest applicable thereto) specified in this Specific Loss Benefits provision will be paid for injuries resulting from any one accident.



Medical Benefits. When covered injuries require treatment by a licensed physician or surgeon, care or service provided by a legally constituted hospital, attendance of a registered graduate nurse, X-ray examination or the use of an ambulance, the Association will pay, in addition to any other benefits payable under this policy, the expense actually incurred therefor by the Insured within the fifty-two week period immediately following the date of the accident, but not to exceed, in the aggregate, \$50.00 for each \$1,000.00 of the Principal Sum for any one accident.

Exposure and Disappearance. (a) If, because of an accident covered by this policy, the Insured is unavoidably exposed to the elements and as a result of such exposure suffers a loss for which benefits are otherwise payable hereunder, such loss will be covered under the terms of this policy. (b) If the body of the Insured has not been found within fifty-two weeks after the date of a covered accident which results in the disappearance, sinking or damaging of the aircraft in which the Insured was riding at the time of such accident, it will be presumed that the Insured suffered loss of life as a result of accidental bodily injuries covered by this policy.

Policy Period. This insurance shall commence on the Effective Date at 12:01 A.M., Standard Time at the Point of Departure, and shall terminate either upon completion of the airline trip described in the Schedule or upon expiration or surrender for refund or credit of said transportation ticket, but in no event shall this insurance extend beyond a period of twelve months.

Exceptions. This policy does not cover (1) any loss caused by act of declared or undeclared war, or (2) suicide or any attempt thereat, sane or insane.

POLICY PROVISIONS

Entire Contract; Changes: This policy, including the endorsements and the attached papers, if any, constitutes the entire contract of insurance. No change in this policy shall be valid until approved by an executive officer of the Association and unless such approval be endorsed hereon or attached hereto. No agent has authority to change this policy or to waive any of its provisions.

Notice of Claim: Written notice of claim must be given to the Association within twenty days after the occurrence or commencement of any loss covered by the policy, or as soon thereafter as is reasonably possible. Notice given by or on behalf of the Insured or the beneficiary to the Association at Omaha, Nebraska, or to any authorized agent of the Association, with information sufficient to identify the Insured, shall be deemed notice to the Association.

Claim Forms: The Association, upon receipt of a notice of claim, will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not furnished within fifteen days after the giving of such notice, the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss upon submitting, within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, the character and the extent of the loss for which claim is made.

Proofs of Loss: Written proof of loss must be furnished to the Association at its said office within ninety days after the date of the loss for which claim is made. Failure to furnish such proof within the time required shall not invalidate nor reduce any claim if it was not reasonably possible to give proof within such time, provided such proof is furnished as soon as reasonably possible and in no event, except in the absence of legal capacity, later than one year from the time proof is otherwise required.

Time of Payment of Claims: All indemnities payable under this policy will be paid immediately upon receipt of due written proof of loss.

Payment of Claims: Indemnity for loss of life will be payable in accordance with the beneficiary designation and the provisions respecting such payment which may be prescribed herein and effective at the time of payment. If no such designation or provision is then effective, such indemnity shall be payable to the estate of the Insured. Any other accrued indemnities unpaid at the Insured's death may, at the option of the Association, be paid either to such beneficiary or to such estate. All other indemnities will be payable to the Insured.

Physical Examinations and Autopsy: The Association at its own expense shall have the right and opportunity to examine the person of the Insured when and as often as it may reasonably require during the pendency of a claim hereunder and to make an autopsy in case of death where it is not forbidden by law.

Legal Actions: No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after written proof of loss has been furnished in accordance with the requirements of this policy. No such action shall be brought after the expiration of three years after the time written proof of loss is required to be furnished.

Change of Beneficiary: The right to change of beneficiary is reserved to the Insured and the consent of the beneficiary or beneficiaries shall not be requisite to surrender or assignment of this policy or to any change of beneficiary or beneficiaries, or to any other changes in this policy.

Other Insurance In This Association: If a like policy or policies, previously issued by the Association to the Insured be in force concurrently herewith, making the aggregate of the Principal Sum in excess of \$62,500, the excess insurance shall be void and all premiums paid for such excess shall be returned to the Insured.

Conformity With State Statutes: Any provision of this policy which, on its effective date, is in conflict with the statutes of the state in which the Insured resides on such date is hereby amended to conform to the minimum requirements of such statutes.

ADDITIONAL PROVISIONS

(a) If the original transportation ticket or pass held by the Insured is exchanged for another ticket or pass issued by a scheduled airline, covering all or any portion of the airline trip specified in the original transportation ticket or pass, this insurance shall apply to the airline trip for which the substituted ticket or pass is issued in the same manner and to the same extent that it would have applied had the original transportation ticket or pass remained in effect. The Association will return to the Insured the premium for this policy in the event that because of cancellation of the flight by the airline, no part of said airline trip is made within the period covered by this policy. (b) No provision of the charter, constitution or by-laws of the Association shall be incorporated in full herein shall avoid the policy or be used in defense of any legal proceeding hereunder. (c) The Association operates on the full legal reserve basis and the contingent mutual liability hereunder shall not exceed one additional premium. (d) The Annual Meeting of the Association will be held at 10 o'clock a.m. on the second Saturday after the first day of February, at the Home Office of the Association.

Countersigned by:

Betty Jane Ginder
Authorized Agent

W. J. Maguire

Secretary

V. J. Schmitt

President

From S. H. MESSINA

4103-41st.

BRENTWOOD, MD



To Mrs. Josephine Messina

(Your home, office or beneficiary)

4103-41st.

Brentwood, Md.

Pretrial Exhibit

P#1

EB

AVAILABLE
bound volume

28. State part of body injured and nature and extent of injury Gross bodily injuries

29. Did injury cause loss of any member or part of member? Unknown If so, describe exactly

30. Was employee injured while in performance of duty? No If not, or in doubt, give detailed statement.
Individual was being carried in a duty status until he reached his point of hire, Brentwood, Maryland, after having been RIF'd.

31. Was injury caused by:
(a) Willful misconduct of the employee? No (b) Intention of employee to bring about injury or death of himself or another? No (c) Employee's intoxication? No
(If any answers to these questions are made in the affirmative, the reporting officer should attach an additional statement giving the reasons for his conclusions)

32. Was written notice of injury given within 48 hours? Yes or No If not, did immediate superior have actual knowledge of injury? (Answer in question 3, Form G. A. 1, must be completed if notice was not given within 48 hours)

33. Names and addresses of witnesses to injury Unknown

34. Was injury caused by a third party other than a Government employee or agency? Yes If so, has employee been instructed in procedure under the Bureau's regulations? Widow has applied for compensation to U.S. (A) and is being processed by the Bureau.

35. Name and address of physician who first attended case Unknown

36. How soon after injury? Unknown

37. To what hospital sent? Unknown Location

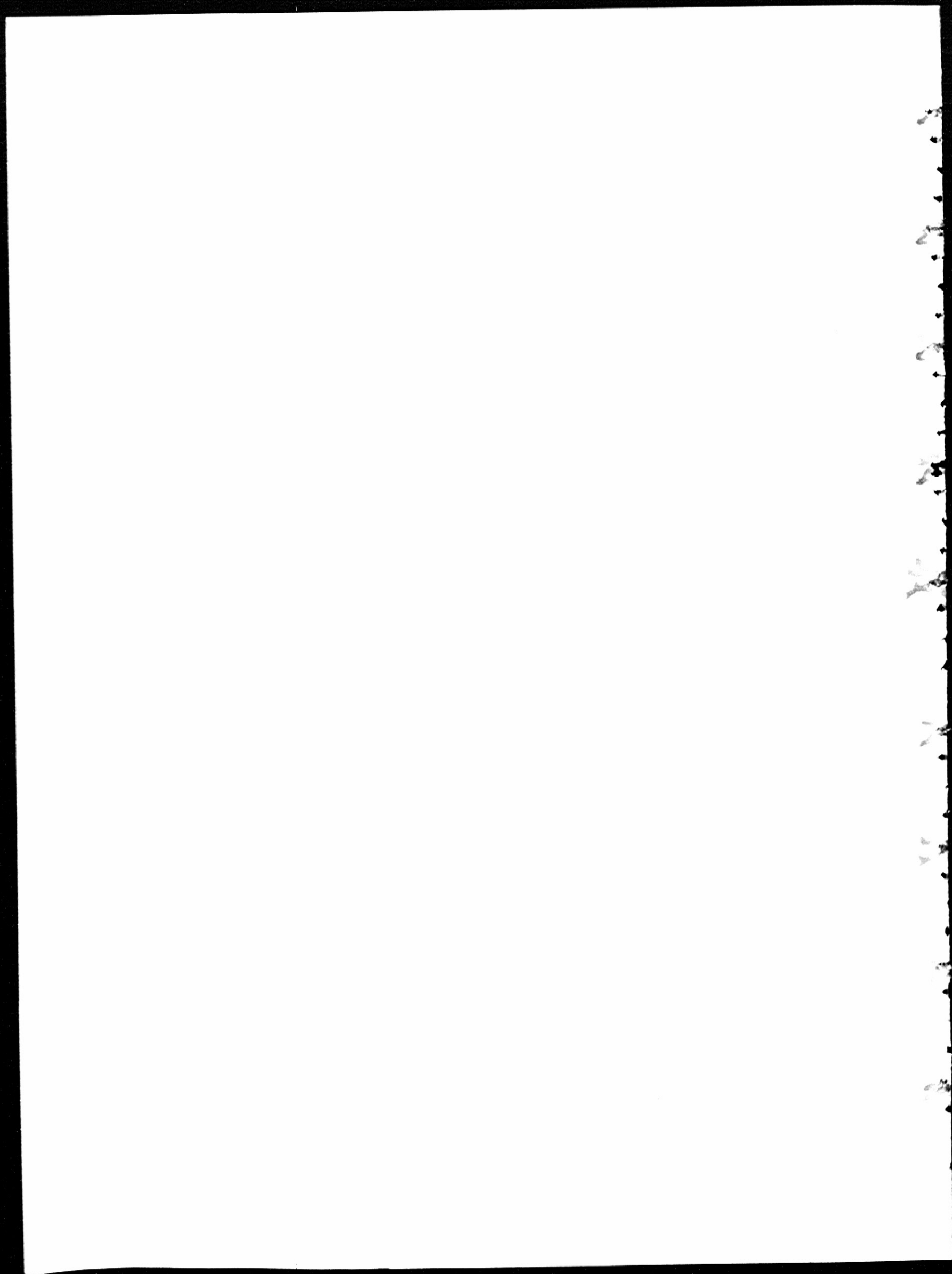
38. Name and address of physician now attending case NA

Signed this 10th day of June 1960
at Seoul, Korea

(Signature of reporting officer)
Special Agent in Charge, FBI, Seoul, Korea

JUN 28 1960

10-2007-1
Revised April 14, 1958



PLAINTIFF'S EXHIBIT NO. 2B

June 22, 1961

X-1298188

Mrs. Josephine L. Messina
5605 Patterson Road
Riverdale Heights, Maryland

Dear Mrs. Messina:

Your claim for compensation has been approved this date. As explained previously, it is necessary for the balance of the third party credit to be exhausted before compensation payments can begin. Since we yet do not have sufficient information to establish your late husband's pay rate on the day of the accident, we are unable to inform you of the approximate date your award will begin. We will advise you of this at a later date.

Very truly yours,

S. D. Logsdon, Chief
Division of Claims Services

By:

CC: Jackson, Gray & Jackson
Attorneys at Law
719 Fifteenth Street, N.W.
Washington 5, D.C.

CC: Civilian Personnel Division
Headquarters
Department of the Army
Office of the Chief of Engineers
Washington 25, D.C.

PLAINTIFF'S EXHIBIT NO. 3

U.S. ARMY ENGINEER DISTRICT, FAR EAST
CORPS OF ENGINEERS
APO 301, San Francisco, California

POFVV 262/19

29 December 1959

TVL O 12-20

SUBJECT: Travel Orders - United States

TO: Commanding Officer
U.S. Army Transportation Terminal Command, Japan
APO 503

1. Pursuant to CPR T3, 18 Jun 59, the fol DAC pers, having been reached by Reduction-In-Force (RIF), are auth. to proceed from Seoul, Korea to POE designated in Port Call, upon call of the Port Commander for movement by air or surface trans to a US POD and further movement to destination indicated below. Air port call, report to Army ATCO, Bldg #1629, MATS Terminal, Tachikawa Air Base, immediately upon arrival in Japan or not later than five hours prior to flight departure time; surface port call, report not later than 0900 hrs to CO, USATTCJ, APO 503.

MR DALE R. JONES, Construction Rep (Gen), GS-11, \$7030 p/a, 1st Cav Div Res Off, USAEDFE, APO 301, auth to Phoenix, Arizona. TDN PCS: 21x2050 08-9312 P6215-02 S92-800, CIC 2-0-1-A-05. Contact Address: Phoenix, Arizona. Empl auth. to board ship at Inchon, Korea and is req to report to or telephone the Troop Movement Branch, Inchon Port, Bldg 837, phone Inchon 243, with 3 copies of travel orders for booking and briefing at least 3 days prior to sailing date.

MR SALVATORE H. MESSINA, Construction Rep. (Gen), GS-11, \$7030 p/a, Seoul Res Engr Off, USAEDFE, APO 301, auth to Brentwood, Maryland. TDN PCS: 21x2050 08-9312 P6215-02 03 S92-800. CIC 2-0-1-A-05. Contact Address: 4103-41 St. Brentwood, Maryland.

MR CHARLES D. PEELER, Construction Rep (Gen), GS-11, \$7030 p/a, Taegu Res Engr Off, USAEDFE, APO 301, auth to San Francisco, California provided cost in excess of cost to actual point of hire, Daly City, California is borne by indiv. TDN PCS: 21x2050 08-9312 P6215-02 03 S92-800. CIC 2-0-1-A-05. Contact Address: 230 Alta Loma Drive So. San Francisco, California.

MR WILLIAM E. BLACKMORE, Construction Rep (Gen), GS-11, \$7510 p/a, Ascom Res Engr Off, USAEDFE, APO 301, auth to Washington C.H. Ohio. TDN PCS: 21x2050 08-9312 P6215-02 S92-800. CIC 2-0-1-A-05. Contact Address: Route 3, Washington C.H. Ohio.

MR. JAMES C. JENKINS, Construction Rep (Gen), GS-9, \$6135 p/a, Taegu Res Engr Off, USAEDFE, APO 301, auth to Jefferson, North Carolina. TDN PCS: 21x2050 08-9312 P6215-02 S92-800. CIC 2-0-1-A-05, Contact Address: Box 129 West Jefferson, North Carolina. Empl auth to board ship at Inchon, Korea, and is requested to report to or telephone the Troop Movement Branch, Inchon Port, Bldg 837, phone Inchon 243, with 3 copies of travel orders for booking and briefing at least 3 days prior to sailing date.

MR JAMES K. HODDER, JR., Construction Rep (Gen), GS-9, \$5985 p/a, 7th Inf Div Res Off, USAEDFE, APO 301, auth to Auburn, California. TDN PCS: 21x2050 08-9312 P6215-02 S92-800. CIC 2-0-1-A-05. Contact Address: Post Box #362 Auburn, California.

MR LAWRENCE V. ASHFIELD, Construction Rep (Gen), GS-9, \$5985 p/a, Taegu Res Engr Off, USAEDFE, APO 301, auth to Massena, New York. TDN PCS: 21x2050 08-9312 P6215-02 S92-800. CIC 2-0-1-A-05. Contact Address: Box 107, Waddington, New York. Empl auth to board ship at Inchon, Korea and is req to report to or telephone the Troop Movement Branch, Inchon Port, Bldg 837, phone Inchon 243, with 3 copies of travel orders for booking and briefing at least 3 days prior to sailing date.

MR CHARLES C. FOSS, Construction Rep (Gen), GS-7, \$4525 p/a, Seoul Res Engr Off, USAEDFE, APO 301, auth to Biddeford, Maine. TDN PCS: 21x2050 08-9312 P6215-02 S92-800. CIC 2-0-1-A-05. Contact Address: 9915 Gandy Road, Valley Station, Kentucky. Empl auth to board ship at Inchon, Korea and is req to report to or telephone the Troop Movement Branch, Inchon Port, Bldg 837, phone Inchon 243, with 3 copies of travel orders for booking and briefing at least 3 days prior to sailing date.

2. TDN. TBGAA. TBMAA & RW in PAC. Tvl by common carrier or TPA within CONUS.

3. Hand baggage for use of travelers while traveling must accompany the empl and is limited to 65 lbs while traveling by mil acft, 2 pieces of cabin baggage while traveling by surface craft. Hold baggage consisting of personal effects not to exceed 350 lbs is auth. Hold baggage will be shipped to POL marked with owner's full name and will be addressed as fol:

TO: (Port of Embarkation)

(Designation of port)

FOR: Shipment to: (Authorized Residence)

Personal hand baggage will not be boxed or crated. Hold baggage for shipment from Army terminal will be adequately boxed or placed in sturdy, light-weight containers. Transportation of hold baggage is auth by rail and water; when selected by the responsible transportation officer, express or air transportation is auth to expedite movement. When hold baggage is shipped other than as free checkable baggage, the weight of the shipment will be considered part of the maximum weight allowance for household goods.

4. In lieu of subsistence, maximum per diem allowance is auth in accordance with CPR T3. Mileage reimbursement for tvl by POV will be subject to limitation of expense to the govt for the usual mode of trans and will not exceed 10 cents a mile.

5. Upon arrival at the port of entry employees will report to Port Civilian Personnel Office for processing and trans to destination indicated in para 1.

6. Certificate of identification issued at time of initial appointment will be surrendered to personnel in the office listed in para 5.

7. While en route from Seoul, Korea to auth residence, the travelers, except MR. CHARLES D. PEELER, will be considered as being in a dy status for the usual time consumed in tvl between these points and delays prompted by Army terminal requirements. While en route from Seoul, Korea to auth residence, MR CHARLES D. PEELER will be considered as being in a lv status for the usual time consumed in tvl between these points and delays prompted by Army terminal requirements. The selection of an indirect route for personal reasons shall not increase per diem or the period in which salary payment is made for travel time.

8. Transportation of personal effects and household goods of MR CHARLES D. PEELER & MR. SALVATORE H. MESSINA, including temporary storage not to exceed 60 days, is authorized not in excess of gross weight allowance of 3,125 lbs, from Seoul, Korea to destination indicated in para 1, in accordance with CPR T3.

9. Prior to departure from dy station, indiv will have up-to-date immunization register in possession and will acquire primaquine curative treatment for malaria at 548th General Dispensary.

10. Prior to departure from Korea indiv must be in possession of a valid Korean permit.

FOR THE DISTRICT ENGINEER:

/s/ Evelyn Smith
for ROBERT A. BYERS
Chief, Office Service Branch

DISTRIBUTION:

40 - Indiv
2 - Civ Payroll
5 - F&A Br
2 - Section
2 - G-2, 8A
2 - Port
2 - Compt
2 - File
80 - AG-CP

TRAVELER: Show or Reverse Actual Service Rendered Than Requested
 [Copy of Form Prepared by Captain Lichty, USAF, Requesting Transportation for Messina at Cost of \$102.25.] [Original Illegible for Reproducing Purposes]

PLAINTIFF'S EXHIBIT NO. 4

Travis Air Force Base, California
27 February 1959

REVOCABLE PERMIT

The Base Commander, Travis Air Force Base, for and on behalf of the United States, hereby grants to the Travis Air Taxi Service, hereinafter referred to as TAS, a permit to use without charge the aircraft landing and parking facilities at Travis Air Force Base, California for the express purpose of providing air taxi service from Travis Air Force Base to the San Francisco bay area. Said permit shall be subject to and limited by the following terms and conditions:

I

GENERAL:

This permit does not purport to grant any exclusive franchise or license to TAS concerning the services contemplated hereunder. It is expressly understood that no exclusive rights inure to TAS by reason hereof.

II

DURATION:

This permit shall be effective until terminated, as follows:

- A. The parties named above may mutually terminate at any time.
- B. Either party may terminate upon thirty days' written notice, at will.
- C. The Commander, Travis Air Force Base, may terminate immediately, without notice, upon non-compliance by TAS with any of the terms and conditions set forth below.
- D. The Commander, Travis Air Force Base, may terminate immediately, without notice, when he determines in his sole dis-

cretion that an emergency condition exists or that operational necessity makes continuation of the permit unfeasible.

III

SEAT PRIORITY:

The following seat priorities will be maintained:

A. FIRST PRIORITY:

Department of Defense personnel travelling on official orders at the expense of the United States Government.

B. SECOND PRIORITY:

Military personnel travelling on emergency leave.

C. THIRD PRIORITY:

All Department of Defense personnel, including contract employees and dependents thereof.

D. FOURTH PRIORITY:

Non-priority seating will be on a first-come, first-serve basis.

IV

PRICES:

The maximum prices which TAS will charge are as follows:

- A. Travis AFB to San Francisco ----- \$15.00 per seat
- B. Travis AFB to Oakland ----- 15.00 per seat
- C. Charter rates, Travis AFB to San Francisco or Oakland, single engine aircraft ----- 37.50
- D. Charter rates, Travis AFB to San Francisco or Oakland, twin engine aircraft ----- 75.00

V

SERVICE

Aircraft will be non-scheduled and will depart at discretion of TAS. However, weather conditions permitting, flights will depart after no longer than two hours after one passenger has contracted for the flight service.

VI

PROTECTION OF GOVERNMENT:

TAS will sign and maintain current-in-effect the standard Hold Harmless Agreement, AF Form 180.

VII

INSURANCE:

A. TAS will maintain at all times a minimum of \$50,000 liability Insurance per persons in respect to any passenger of any flight undertaken by the company.

B. The insurance coverage shall indicate the United States as an insured party.

C. TAS will assure that the insurer will not invoke the defense of sovereign immunity and such condition will be included in the terms of the policy. A copy of the policy will be sent to the Base Transportation Office, Travis Air Force Base, California.

VIII

FUEL AND MAINTENANCE:

TAS will refuel, obtain ordinary repairs and maintenance (other than minor repairs) at airport facilities other than those at Travis Air Force Base, except under emergency conditions.

IX

FLIGHT AND GROUND RULES:

TAS will comply with all flight and ground rules as are now or may hereinafter be established by the Base Commander, Travis Air Force Base, or other designated Air Force official.

X

PARKING AIRCRAFT:

The aircraft of said company will be parked in areas designated by the tower. When conditions permit, the aircraft will be parked as close to the passenger entrance as possible.

XI

SOLICITATION OF TRADE:

TAS will solicit trade only in a prudent manner, acceptable to the Base Commander, and then only in the facilities presently occupied by the E and J Travel Agency at the Base Terminal.

XII

CONDUCT OF EMPLOYEES:

TAS will be responsible for the conduct, actions, and neat appearance of all employees.

XIII

COMPLAINTS:

Complaints and disagreements in re services will be referred to a senior member of TAS, and to the Base Transportation Officer.

XIV

NOTIFICATION OF ETA:

TAS agrees that all aircraft departing enroute to Travis will cause Travis Tower and the E and J Travel Agency to be notified of their estimated time of arrival at or about their time of departure.

XV

OPERATING CONDITIONS:

A. Under no circumstances will one-engine aircraft be operated except in VFR flight rule conditions as defined by FAA rules.

B. TAS agrees to employ only competent and qualified FAA rule pilots and to maintain all aircraft in top mechanical condition.

C. TAS agrees to maintain a passenger manifest on all passengers, copies to be retained for a period of one year in a file located at the office of the E and J Travel Agency. Said file may be inspected by the Base Commander or his designate at any time.

XVI

SECURING AIRCRAFT:

Upon receipt by the E and J Travel Agency of reported adverse

weather conditions, TAS will assure that its aircraft are properly secured.

XVII

ABORTIVE FLIGHTS:

Any abortive flights returning to point of origin will result in a complete refund to passengers or to the United States Government, where the service was contracted for the Government.

XVIII

LICENSE, ETC. REQUIREMENTS

TAS agrees to maintain current any and all licenses, permits, etc., required by law and regulation at its expenses.

XIX

REPRESENTATION BY EMPLOYEES:

No officer or employee of TAS will represent himself in any manner as having any official connection with the United States Government or the United States Air Force.

XX

FURTHER CONDITIONS:

Further conditions may be hereinafter imposed by the Base Commander.

TRAVIS AIR TAXI SERVICE

/s/

President

APPROVED:

CHARLES W. STARK

Colonel, USAF

Commander

PRESIDENT

This is to certify that that William S. Jamieson whose signature appears above, is an authorized officer of E & J TRAVEL BUREAU, INC., a Corporation, 715 Marin Street, Vallejo, California, and as such has been granted authorization by the Board of Directors to effectively bind and obligate said E & J TRAVEL BUREAU, INC., a Corporation.

SECRETARY

CORPORATION SEAL

APPROVED:

CHARLES W. STARK
Colonel, USAF
Base Commander

CHANGE #1 TO REVOCABLE PERMIT DATED 27 FEBRUARY 1959

1. The following changes to Revocable Permit dated 27 February 59 are effective immediately:

a. Hereafter, the name Travis Air Taxi Service or TAS as it is amended to read Travis Transportation Company Incorporated "doing business as Golden Gate Airways."

b. With the above change, the Travis Transportation Company Incorporated hereby accepts and is bound by all of the provisions of the above reference Revocable Permit.

TRAVIS TRANSPORTATION CO. INC.

By: s/ William S. Jamieson
President

APPROVED:

CHARLES W. STARK
Colonel, USAF
Base Commander

A TRUE COPY:
/s/ Robert D. Lichty
Captain, USAF
Commercial Transportation Officer

SUPPLEMENT #1 TO REVOCABLE PERMIT DATED 27 FEBRUARY
1959

1. In accordance with Section IX of Revocable Permit dated 27 February 1959, the following changes to **GROUND AND FLIGHT RULES** will be effective immediately:

a. All new pilots will be briefed by Travis Base Operations Officer prior to operating in and/or out of Travis Air Force Base.

b. When operating with passengers aboard from Travis Air Force Base, San Francisco International Airport, or Oakland airports with destination listed as any one of the above air fields and from Travis AFB to any other destination and a VFR flight plan is filed, the VFR flight will be conducted in accordance with Civil Air Regulations and the following stipulation.

(1) The reported ceiling and visibility for the departure base, en route, and airport of intended landing will be at least 1500 foot ceiling, prevailing ground visibility at least three miles, and forward flight visibility at cruising altitude at least five miles.

c. When landing at Travis AFB, the traffic pattern and altitude will be as prescribed in 323rd Air Division Supplement #1 to Air Force Regulation 55-19.

d. Passengers will wear seat belts at all times when the aircraft is in motion.

e. Aircraft filing into Travis AFB for a passenger stop will be required to file a new clearance if the passenger stop exceeds fifteen minutes.

f. Passengers will be carried on multi-engine aircraft only.

g. Aircraft filing into or out of Travis AFB will not operate when the crosswind component is above that established by the Base Commander for the type of aircraft operated.

h. United States Air Force personnel, as directed by the Base Commander, will periodically accompany the flights for the purpose of observing the operation and to insure adherence to the provisions of this permit.

Received by Travis Transportation Company Incorporated:

DATE _____ SIGNATURE _____

PLAINTIFF'S EXHIBIT NO. 5

UNITED AIR LINES, INC.

161 2 981053

[Jan 25 '60]

[E & J Travel Bureau's Receipt for Insured's
Reservation on United Air Lines]

PLAINTIFF'S EXHIBIT NO. 6

**GOVERNMENT TRANSPORTATION REQUEST
Finance Center US Army**

VOID AFTER: 15 FEB 60 BILL TO: Indianapolis 49 Ind T/R M6,932,271
THE UNITED AIRLINES COMPANY IS REQUESTED TO FURNISH COACH CLASS
AIR AT LOWEST RATE FROM SAN FRANCISCO, CALIF TO WASHINGTON, D. C.
VIA UA**STOP OVERS AUTH AT GOV'T EXPEN FOR USE OF MR SALVATORE
H MESSINA AND NONE OTHER WITH ***** ACCOMODATIONS FROM
***** TO ***** WITH AUTHORIZATION TO TRANSPORT NOT OVER
***** LBS OF EXCESS BAGGAGE FROM ***** TO *****

TRAVELER'S SIGNATURE

/s/ SALVATORE H MESSINA
TITLE GS-11 DAC

PLACE OF ISSUE TRAVIS AFB, CALIF
25 Jan 60

ISSUING OFFICER'S SIGNATURE

/s/ GREEN L ALLEY JR TA FOR TO
TITLE ROBERT D. LICHTY CAPT USAF CTO GLA

TVL 12-20 DTD 29 Dec 60 PAR 1 HQ
APO 301 SFO, CALIF
21x2050 08-9312 P6215-02 03 S92-800
EXTER TERR BAGG ALL 66#

PLAINTIFF'S EXHIBIT NO. 7

[Plaintiff's Exhibit No. 7 is identical to attachment to REQUEST FOR
ADMISSION UNDER RULE 36, pp. 20-25 of this Joint Appendix.]

CHRONOLOGICAL LISTING OF SERVICE			LAST NAME - FIRST NAME - MI - AFSC		1366A (RegAF) 24 Feb 61	
EDDA	DAFSC	BRIEF DESCRIPTION OF DUTY - ORGANIZATION AND STATION	NO.	DATE LAST EP SUBMITTED	DATE	TYPE
13 Jun 30 - 11 Jun 33		Enl, Cpl, EAD			20 Jan 53	CER
12 Jun 33 - 11 Jun 37		Cadet, United States Military Academy			19 Jul 53	CER
12 Jun 37 - 25 Sep 47		Plt, Dep Op Comdr, Wg Exec Off, Col, EAD			28 Feb 54	CER
CONTINUOUS SERVICE FROM 12 Jun 37						
26 Jun 47	1055	AND Instr. DS W/104 Pfr Op, Hq 1st AF, Mitchell AFB, NY, CONAC			31 Oct 54	CER
10 Aug 48	2700	Student Air War College, Maxwell AFB, Alabama, CONAC			30 Sep 55	ANNUAL
22 Feb 49	4010	Comdr, Gp, 3801st Maint & Sup Gp, Maxwell AFB, Alabama, CONAC			30 Jun 56	PCS
16 Nov 49	2700	Student Air War College, Maxwell AFB, Alabama, CONAC			27 May 57	CER
14 Jul 50	1013	Dep Wg Comdr, Hq 8th Bomb Wing, APO 929, FEAF			30 Sep 57	ANNUAL
22 Aug 50	1013	Wg Comdr, Hq 6131st TFWg, APO 950, FEAF			20 Jun 58	Tng Rpt
20 Dec 50	1013	Dep Wg Comdr, Hq 8th Pfr Bomb Wg, APO 929, FEAF			17 Nov 58	No Rpt 1 Yr
9 Dec 50	1013	Wg Comdr, Hq 8th Pfr Bomb Wg, APO 929, FEAF			17 Nov 59	No Rpt 1 Yr
7 Apr 51	1013	Wg Comdr, Hq 6160th AB Wg, APO 929, FEAF			13 Feb 60	CER
2 Nov 51	2162	Wg Comdr, Hq 6015 Qns Wg, APO 929, FEAF			13 Feb 61	CER
1 Mar 52	2162	Air Div Comdr, Hq 43d ADiv, APO 929, FEAF				
5 Jun 52	0066D	Air Div Comdr, Hq 43d ADiv, APO 929, FEAF				
18 Aug 53	0066C	Dir Special Weapons, Hq SAAMA, Kelly AFB, Texas, AMC				
1 Jul 56	0066C	Wg Comdr, 1708th Ferrying Wing, Kelly AFB, Texas, MATS				
3 Jan 56	0066D	Stu, Japanese Lang, Ensignet, Arlington, Va HqAFIT, Wright-Patterson AFB, (AU)				
16 Jun 56	0066D	Spel Ass't to Comdr, 1501st ATWG (Hv) Travis AFB, California (MATS)				
1 Jul 56	0026B	Base Commander, Hq 5th ABGP, Travis AFB, Calif (MATS)				
8 Apr 59	0026B	Base Commander, Hq 1501st ABGRU, Travis AFB, Calif (MATS)				
1 Jun 59	0026	Base Commander, Hq 1501st ABGRU, Travis AFB, Calif (MATS)				
15 Feb 60	0026	Division Commander, Hq 321st ADiv, Travis AFB, Calif (MATS)				
22 Mar 60	0026	Dep Division Commander, Hq 323rd ADiv, Travis AFB, Calif (MATS)				
8 Mar 60	0066	Deputy Wing Co, Hq 1501st Air Tngd Wg, Travis AFB, Calif (MATS)				
22 Sep 60	0066	Specl Asst to the Wg Cdr, Hq 1501st ATWG, Travis AFB, Calif (MATS)				

Plaintiff's EXHIBIT NO. 10
Evidenced

1. LAST NAME - FIRST NAME - MI - AFSC - GRADE		2. JOURNAL	
STARK CHARLES W 1366A (RegAF)			
3. PERSONAL DATA			
DATE OF BIRTH	RELIGION	HOME BIRTHPLACE	
5 May 12	MEMBER-8044B	Asbury Park, New Jersey	
UNITAL AND DE. FREQUENCY STATUS	RACE	PERMANENT MAILING ADDRESS	
D-2	CAU	IN CARL 15 HQ USAF	
4. SERVICE DATA			
SOURCE OF COMMISSION	DATE OF CURR. EAO.	CITY & STATE FROM WHICH ORDERED TO A.O.	
USMA (37)	12 Jun 37	Trenton, New Jersey	
5. SERVICE DATES			
15000	12 Jun 37	POB	23 Mar 37
15000	12 Jun 34	PLSD	000000
17000	12 Jun 37	0000-31 Jul 61	
1700	12 Jun 34	UNIT & DA DDL 15.	
1700		AS BY COMMITMENT	1. 1. E
6. GRADE DATA			
TEMPORARY GRADE	PERMANENT GRADE	EFFECTIVE DATE	DATE OF RANK
Captain	2A 1A (P)	12 Jun 37	12 Jun 37
Major	1st Lt	12 Jun 40	12 Jun 40
1st Colonel		1 Oct 40	9 Sep 40
Colonel		13 May 42	1 Mar 42
		24 Sep 42	24 Sep 42
		26 Jan 44	26 Jan 44
		22 Jul 47	12 Jun 47
	Captain	2 Jul 48	1 Jul 48
	1st Colonel	28 Jul 51	28 Jul 51
	Colonel		
7. FOREIGN SERVICE			
DATE DEPARTED	LOCATION	ACCOMPANIED OR UNACCOMPANIED	FSNO
28 Feb 44	RAMS	UNACC	4 Aug 53
5 Jul 50	Japan	UNACC	
8. FOREIGN SERVICE SUMMARY			
DATE RETURNED 21: 4 AUG 53			
9. ASSIGNMENT LIMITATIONS			
DEPARTED 6 JUL 54 ON PCS. DISLOCATION ALLOWANCE CTRHER			
AFSC	DESIGNATED	AIR FORCE SPECIALTIES	DATE AWARDED
0066	P	Air Commander	23 May 52
0041		Dir of Materiel	1 Feb 54
1125B		Pilot, Pfr-Inter	13 Feb 58
1115B	2	Pilot, Tac Pfr	2 Sep 58
1135A	3	Pilot, Tac Pfr	2 Sep 58
0026		Organisation Commander	1 Jul 58
10. CURRENT ACTIVE DUTY GRADE			
Colonel			
DATE OF RANK 26 Jan 44			

OFFICER MILITARY RECORD

• 67001 IN APR 1965 GIVE AN EXHIBITION WITHIN 100000

22

13. ASSIGNMENT PREFERENCE STATEMENT (No include as applicable. Career objective, training desired, overseas area preference, etc. area preference, type unit desired, type duty desired, etc.)		LAST NAME - FIRST NAME - MI - AFSC STARK CHARLES W 1366A (BogAP)		3	
14. COMBAT RECORD 32 Cmbt Miss, 50 Cmbt Hrs, P-40 & P-47, BAME, Mar 44 - Mar 45 / 46 Cmbt Miss, 86 Cmbt Hrs, P-51, P-60, C-46, Korea / 1953 / Rome-Armo (BSS) MDG 080, 1944 / UNDOF (BSS) G 0374, HQFEAF, 4 Aug 51 / UN OXI (BSS) G 0355, HQFEAF, 28 Jul 51 /		15. RESERVE DATA			
16. AERONAUTICAL RATINGS, DESIGNATIONS AND FLYING STATUS		17. REMARKS			
RATING - STATUS		AUTHORITY		EFF. DATE	
Flying Status		P1, P0245, WD		20 Oct 37	
Pilot		P3, P0 247, WD		5 Oct 38	
Senior Pilot		P19, P0 265, WD		5 Nov 42	
Technical Observer		P7, P0 231, WD		27 Sep 43	
Command Pilot		P2, A0 23, Hq AMC		14 Oct 53	
From 20 Oct 37		To 20 Oct 37			
18. ANNUAL FLYING HOURS		19. SOCIAL SECURITY NO. 136-32-6205		PREVIOUS SERVICE NOS. A020839	
CURRENT AIRCRAFT		NON-CURRENT AIRCRAFT		OTHER	
JET		JET		JET	
CORV		CORV		CORV	
MISC		MISC		MISC	
ANNUAL TOTAL		ANNUAL TOTAL		ANNUAL TOTAL	
200100		76105		200100	
200100		168100		200100	
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200100		168100		200100	
140000		132145			

ELECTION OF TRAVEL PAY			
I DESIRE TRAVEL PAY TO: (Check the one of your choice)			
<input type="checkbox"/>		PLACE OF ENLISTMENT	
<input type="checkbox"/>		HOME OF RECORD AT TIME ENTERED SERVICE	
PRINT BELOW COMPLETE ADDRESS OF PLACE WHERE YOU DESIRE TRAVEL PAY TO:			
STREET		CITY	
COUNTY		STATE	
PRINT NAME GRADE & AFSC		SIGNATURE	DATE
STARK, CW COL 1366A		Charles W Stark	26 July 61

TAFB FORM 'O' 47 PREVIOUS EDITION OF THIS FORM MAY BE USED

BEST COPY
from the original

V. COMMENTS BY REPORTING OFFICIAL (Be factual and specific. Add comments which increase the objectivity of the rating.)
FACTS AND SPECIFIC ACHIEVEMENTS: I CONSIDER COLONEL STARK TO BE AN OUT-
 STANDING OFFICER FOR THE FOLLOWING SPECIFIC REASONS:

1. HE ASSUMED COMMAND OF HIS AIR BASE GROUP AND THE INSTALLATION
 AT A TIME WHEN IT HAD JUST BEEN TRANSFERRED FROM ONE MAJOR COMMAND TO
 ANOTHER. MANY KEY PEOPLE WHO WERE UNUSUALLY WELL-QUALIFIED HAD BEEN
 WITHDRAWN AND HAD TO BE REPLACED BY PEOPLE WHO WERE NOT ONLY NEW TO THE
 INSTALLATION BUT, IN SOME CASES, NEW TO THE TYPE OF WORK INVOLVED.
 SIGNIFICANT UNDERMANNING WAS A PART OF HIS PROBLEM. DESPITE THESE HANDI-
 CAPS, COL STARK RAPIDLY ORGANIZED AN EFFECTIVE STAFF AND EFFECTIVE SUB-
 STANTIAL UNITS IN A MANNER THAT SOON RESULTED IN A SMOOTHLY RUNNING
 INSTALLATION.

2. HE ESTABLISHED AND RIGOROUSLY IMPLEMENTS THE POLICY THAT OPER-
 ATIONAL UNITS HAVE THE FIRST PRIORITY FOR ALL RESOURCES UNDER HIS CON-
 TROL. THIS FREQUENTLY RESULTS IN HIS DENYING RESOURCES TO HIS OWN
 UNITS IN ORDER TO BETTER ACCOMMODATE THE OPERATIONAL ONES.

3. HE HAS VASTLY IMPROVED THE BASE AND, TO A VERY LARGE DEGREE,
 WITHIN HIS OWN RESOURCES INSTEAD OF WITH LARGE OUTLAYS OF APPROPRIATED
 FUNDS. INCLUDED IN THESE IMPROVEMENTS ARE ACTIONS SUCH AS REFURBISHING
 APARTMENTS FOR TRANSIENT FAMILIES TRAVELING OVERSEAS BY MATS AIRLIFT,
 AND PROVIDING THEM WITH SMALL COOKING KITS AND FORMULA-MAKING KITS FOR
 BABIES. IMPROVEMENTS IN AIRMEN'S BARRACKS AND RECREATIONAL FACILITIES;
 AND ENLARGEMENT OF BASE EXCHANGE, COMMISSARY AND OTHER FACILITIES BY
 IMPROVING WITH QUONSET HUTS.

4. WHEN FACES WITH THE REQUIREMENT TO ACCEPT ADDITIONAL T-33s IN
 ITS BASE FLIGHT, HE ESTABLISHED A FORMAL, JET TRANSITION SCHOOL FOR
 "CONVENTIONAL" PILOTS THAT HAS A RECORD OF NO ACCIDENTS, EITHER
 IN ITS TRAINING PHASE OR BY ITS GRADUATES. (SEE ATTACHMENT)

VI. COMMENTS BY REPORTING OFFICIAL

NAME, GRADE AND ORGANIZATION

BRIG. GEN. 539A
 HQ 323 AIR DIV

DUTY TITLE

COMMANDER
 COMMAND PILOT

SIGNATURE

DATE

17 NOVEMBER 1959

VII. COMMENTS BY REPORTING OFFICIAL

My personal contact with Colonel Stark occurs about three times a week and
 official observation of the results of his efforts is made almost on a daily basis since
 my Headquarters is on the same Air Base. I concur in Section V of the report, but
 in comparing this officer with others of similar grade and experience, I have
 indicated different ratings than the rating officer in Sections III and IV. This officer
 becomes irritated and frustrated with "red tape and the paper mill."
 This characteristic is common and normal with most outstanding officers, but when
 combined with impatience and impulsiveness, occasionally results in hasty judgment.
 This is the case with Col Stark. I hasten to state that Col Stark is a superior officer
 (See AF Form 77A, attached)

NAME, GRADE AND ORGANIZATION

BRIG. GEN. WALDRON
 HQ 323 AIR DIV (MATS)

DUTY TITLE

Commander
 (Command Pilot)

SIGNATURE

DATE

26 December 1959

114
Plaintiff's Exhibit No. 11

REPORT OR CONTINUATION SHEET TO AF FORMS 77 AND 475			
LAST NAME--FIRST NAME--MIDDLE INITIAL STARK, CHARLES W.		GRADE COLONEL	AFSN 1366A
		DATE 17 Nov 59	
CHECK ONE	ADDITIONAL INCORPORATION TO AF FORM 77	INCORPORATION TO AF FORM 475	PERIOD OF REPORT
<input checked="" type="checkbox"/>	SECTION COMPLETION	LETTER OF EVALUATION	FROM 18 Nov 58 TO 17 Nov 59

SECTION II (CONTINUED)

AND CONTRIBUTE TO THE BASE COMMANDER'S PROBLEMS. IN ADDITION TO THE PROBLEMS ASSOCIATED WITH RUNNING THE BASE AS A WHOLE, COL STARK'S OWN UNITS TOTAL ABOUT 3,000 PEOPLE AND REPRESENT AN UNUSUALLY LARGE AIR BASE GROUP.

SECTION V (CONTINUED)

STRENGTHS: IN ADDITION TO THE ATTRIBUTES NORMALLY EXPECTED OF AN OUTSTANDING OFFICER, COL STARK DEMONSTRATES A UNUSUAL FLEXIBILITY AND CHEERFULNESS IN THE FACE OF CONTINUING, UNEXPECTED AND COMPLEX PROBLEMS. HE IS PERFECTLY CAPABLE OF STATING HIS POSSIBLE DISAGREEMENT WITH DIRECTIVES IN A FORCEFUL AND COLORFUL MANNER, AND THEN, HAVING LOST THE ARGUMENT, PROCEEDING CHEERFULLY WITH THE EXECUTION OF THE DIRECTIVE. A GOOD MIND AND A SOUND PHYSIQUE MAKE HIM CAPABLE OF VERY LARGE AMOUNTS OF PRODUCTIVE WORK.

RECOMMENDED IMPROVEMENT AREAS: LIKE ALL OF US, COL STARK HAS HIS SHARE OF CHARACTERISTICS THAT I PREFER TO CALL SHORTCOMINGS RATHER THAN FAULTS. HE HAS PERMITTED HIMSELF TO BECOME ADDICTED TO SLANG EXPRESSIONS AND TO THE USE OF UNDULY REPETITIVE "PET" PHRASES TO THE UNUSUAL EXTENT THAT HIS ABILITY TO COMMUNICATE CLEARLY SOMETIMES SUFFERS. I HAVE BROUGHT THIS TO COL STARK'S ATTENTION AND I AM SURE THAT HE CAN AND WILL CORRECT THIS SHORTCOMING.

SUGGESTED ASSIGNMENTS: HIS ABILITY TO MAKE PEOPLE LIKE TO WORK FOR HIM AND A BROAD BACKGROUND GIVE HIM AN UNUSUALLY WIDE ASSIGNABILITY. I CONSIDER HIM QUALIFIED FOR WING OR DIVISION COMMAND.

INTEREST IN FLYING: HE IS QUALIFIED ON BOTH JET AND CONVENTIONAL TYPE AIRPLANES AND HIS INTEREST IN FLYING IS UNUSUALLY HIGH. HE IS THE TYPE WHO FLIES FOR THE LOVE OF IT, AND NOT MERELY FOR PAY OR POSSIBLE PROFESSIONAL ADVANCEMENT.

SELF-IMPROVEMENT EFFORTS: COL STARK READS WIDELY AND, TO THE BEST OF MY KNOWLEDGE, PRIMARILY THOSE PUBLICATIONS OF SIGNIFICANCE, SUCH AS THE QUARTERLIES DEVOTED TO NATIONAL OR INTERNATIONAL PROBLEMS.

CIVIC RESPONSIBILITIES: THE 4,200 FAMILIES LIVING IN PERHAPS HALF-A-DOZEN COMMUNITIES WITHIN FIFTY MILES OF TRAVIS AIR FORCE BASE, PLACE AN UNUSUAL DEMAND ON THIS INSTALLATION COMMANDER IN THE CIVIC RESPONSIBILITY FIELD. DESPITE THE LARGE NUMBER OF (SEE ATTACHMENT)

AUTHENTICATION BY PREPARING OFFICIAL		
NAME AND GRADE OF PREPARING OFFICIAL G. F. MC GUIRE, BRIG GEN	DUTY TITLE COMMANDER COMMAND PILOT	AFSN 539A
ORGANIZATION 13 AF DIVISION TRAVIS AFB, CALIFORNIA	SIGNATURE <i>[Signature]</i>	

AF FORM 773

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from the original


13. ASSIGNMENT PREFERENCE STATEMENT (No limits on applicable. Career objective, training desired, overseas area preference, etc. area preference, type unit desired, type duty desired, etc.)		LAST NAME - FIRST NAME - MI - AFSC STARK CHARLES W 1366A (BogAP)		3	
14. COMBAT RECORD 32 Combt Mens, 50 Combt Hrs, P-40 & P-47, NAME, Mar 44 - Mar 45 / 46 Combt Mens, 86 Combt Hrs, P-51, P-80, C-46, Korea / 1953 / Rome-Armo (BSS) WDG ORO, 1944 / UNDOF (BSS) G O 74, HqFEAF, 4 Aug 51 / UN OCE (BSS) G O 55, HqFEAF, 28 Jul 51 /					
15. AERONAUTICAL RATINGS, DESIGNATIONS AND FLYING STATUS		16. RESERVE DATA			
15.1. RATING - STATUS Flying Status: P1, P0245, MD Pilot: P1, P0 247, MD Senior Pilot: P19, P0 265, MD Technical Observer: P7, P0 231, MD Observer Pilot: P2, AO 23, Hq AMC 1950 20 Oct 37 1950 20 Oct 37		15.2. AUTHORITY 20 Oct 37 5 Oct 38 5 Oct 42 27 Sep 43 14 Oct 53			
17. ANNUAL FLYING HOURS		18. REMARKS			
17.1. CURRENT AIRCRAFT DATE: 20 Oct 37 JET: 167153 76110 CORV: 168130 116115 14 Dec 60 132145 125145		17.2. NON-CURRENT AIRCRAFT JET: 76105 CORV: 108100			
17.3. OTHER		17.4. ANNUAL TOTAL			
		310110 283125 258130			
19. AIRCRAFT QUALIFICATIONS T-33					
20. TOTAL FLYING HOURS		21. TOTAL			
DATE: 27 Oct 53 27 Oct 53 1130110 298110 261115 267		462115 708115			
A. Waiver AFR 60-2, Non-current					
B. IP C-54, IP C-47					

1. NAME - LAST NAME - FIRST NAME - MIDDLE INITIAL		2. GRADE	3. PERMANENT AT GRADE	4. AFSC	
STANK, CHARLES W.		Colonel	Colonel	1366A	
5. PRESENT DUTY		6. AFSC	7. PERIOD OF REPORT		
Command Pilot		0066	FROM 18 Nov 58 TO 17 Nov 59		
8. ORGANIZATION		9. PERIOD OF SUPERVISION	10. REASON FOR REPORT		
Hq 1901st Air Base Group, MATS, Travis AFB, California		351	No Report Rendered 1 Year		
E. NOTES PRIOR DUTIES: None. CURRENT DUTY: Base Commander, Group Level, AFSC: 0026. Auth Gr: Colonel. THE BASE WORKING POPULATION IS ABOUT 14,000 PEOPLE, OF WHOM APPROXIMATELY 12,500 ARE MILITARY. THIS UNUSUALLY LARGE AND ACTIVE BASE INCLUDES TENANT UNITS OF MAJOR SIZE FROM STRATEGIC AIR COMMAND, AIR DEFENSE COMMAND AND THE ARMY. WHEN FAMILIES LIVING IN GOVERNMENT QUARTERS ARE CONSIDERED, THE BASE REPRESENTS AN INTEGRATED COMMUNITY OF ABOUT 20,000 PEOPLE. APPROXIMATELY 4,800 FAMILIES LIVE OFF BASE (SEE ATTACHMENT) Pltfs. Exhibit No. 11					
F. PERFORMANCE FACTORS (Compare this officer ONLY with officers of the same grade)					
1. KNOWLEDGE					
1	2	3	4	5	
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	
2. COOPERATION					
1	2	3	4	5	
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	
3. JUDGMENT					
1	2	3	4	5	
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	
4. MANAGEMENT QUALITIES					
1	2	3	4	5	
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	
5. LEADERSHIP					
1	2	3	4	5	
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	
6. COMMUNICATION FACILITY					
1	2	3	4	5	
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
7. PROMOTION POTENTIAL					
1	2	3	4	5	
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
8. ADDITIONAL FACTORS					
FACTORS	INSUFFICIENT	SATISFACTORY	COMPETENT AND EFFICIENT	EXCELLENT	OUTSTANDING

AF 5-77 201 24 EDITION OF THIS FORM MAY BE USED

USAF OFFICER EFFECTIVENESS REPORT

Plaintiff's Exhibit No. 11

L. INCORPORATION OR CONTINUATION SHEET TO AF FORMS 77 AND 475				
LAST NAME—FIRST NAME—MIDDLE INITIAL STARK, CHARLES W.		GRADE COLONEL	AFSN 1366A	DATE 17 Nov 59
CHECK ONE	ADDITIONAL INCORPORATION TO AF FORM 77	INCORPORATION TO AF FORM 475	PERIOD OF REPORT	
	<input checked="" type="checkbox"/> SECTION CONTINUATION	LETTER OF EVALUATION	FROM 18 Nov 58	TO 17 Nov 59
<p>SECTION V (CONTINUED)</p> <p>COMMUNITIES INVOLVED, COLONEL STARK HAS ESTABLISHED EFFECTIVE COMMUNITY RELATIONS AND USES A SOMEWHAT NOVEL APPROACH THAT THESE RESPONSIBILITIES CAN BE DISCHARGED ON A "STRICTLY BUSINESS" BASIS.</p>				
B. AUTHENTICATION BY PREPARING OFFICIAL				
NAME AND GRADE OF PREPARING OFFICIAL G. F. MC GUIRE, BRIG GEN		DUTY TITLE COMMANDER COMMAND PILOT	AFSN 539A	
ORGANIZATION Hq 323 AIR DIVISION TRAVIS AFB, CALIFORNIA		SIGNATURE 		

AF FORM 77a
JUN 58

GOVERNMENT PRINTING OFFICE 1000 OF 1000000

Plaintiff's Exhibit No. 11

INDORSEMENT OR CONTINUATION SHEET TO AF FORMS 77 AND 473																	
LAST NAME—FIRST NAME—MIDDLE INITIAL			GRADE	AFSN	DATE												
STARK, CHARLES W.			Colonel	1366A	28 Dec 59												
CHECK ONE	<input type="checkbox"/>	ADDITIONAL INDORSEMENT TO AF FORM 77	<input type="checkbox"/> INDORSEMENT TO AF FORM 473		PERIOD OF REPORT												
	<input checked="" type="checkbox"/>	SECTION CONTINUATION	<input type="checkbox"/> LETTER OF EVALUATION		FROM 18 Nov 58 TO 17 Nov 59												
<p>Section VII, continued:</p> <p>and has effectively and efficiently improved facilities on Travis AFB during the period of this report. As a result of his imagination, initiative, and aggressiveness, this has been accomplished in many instances by improvisation when labor, material, or funds were lacking. His spontaneity, good humor, refreshing outlook, and earnestness of purpose make it a real pleasure to work with him.</p>																	
<p align="center">AUTHENTICATION BY PREPARING OFFICIAL</p> <table border="1"> <tr> <td>NAME AND GRADE OF PREPARING OFFICIAL</td> <td>DUTY TITLE</td> <td>AFSN</td> </tr> <tr> <td>R. L. WALDRON, Major General</td> <td>Commander (Command Pilot)</td> <td>1366A</td> </tr> <tr> <td>ORGANIZATION</td> <td colspan="2">SIGNATURE</td> </tr> <tr> <td>Hq WESTAF (MATS)</td> <td colspan="2"><i>R. L. Waldron</i></td> </tr> </table>						NAME AND GRADE OF PREPARING OFFICIAL	DUTY TITLE	AFSN	R. L. WALDRON, Major General	Commander (Command Pilot)	1366A	ORGANIZATION	SIGNATURE		Hq WESTAF (MATS)	<i>R. L. Waldron</i>	
NAME AND GRADE OF PREPARING OFFICIAL	DUTY TITLE	AFSN															
R. L. WALDRON, Major General	Commander (Command Pilot)	1366A															
ORGANIZATION	SIGNATURE																
Hq WESTAF (MATS)	<i>R. L. Waldron</i>																

AF FORM 77a

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Mutual OF OMAHA

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION
The Largest Exclusive Health and Accident Company in the World



V. J. SKUTT,
PRESIDENT

March 16, 1960

Plaintiff's EXHIBIT NO. 12

Mr. L. Harold Sothoron
Attorney at Law
1406 M Street, NW
Washington 5, D.C.

WHEN REPLYING PLEASE REFER
TO FILE S- 115106
T6AV-18228-A

Salvatore H. Messina, dec'd
Brentwood, Md.

Dear Mr. Sothoron:

We acknowledge receipt of proof of loss and certificate of death in the matter of the death of Salvatore H. Messina.

The policy issued to Mr. Messina by its terms and provisions does not extend coverage while Mr. Messina was a passenger of Travis Air Service from Travis Air Force Base to San Francisco International Airport. Since Mr. Messina's death occurred in the crash of the Travis Air Service plane, there is no liability for the loss which occurred.

We regret we can be of no financial assistance to you or your client.

Yours sincerely,

C. C. Rose
Second Vice President

CCR:BJM



HOME OFFICE — OMAHA, NEBRASKA

PLAINTIFF'S EXHIBIT NO. 13

FOREWORD

HEADQUARTERS,
DEPARTMENT OF THE ARMY
Washington 25, D. C., 18 June 1959

1. Transmitted herewith is CPR T3, Civilian Travel, revised, 18 June 1959.

2. This revision incorporates numerous changes to bring these regulations up-to-date. It contains new and revised policies, and instructions concerning the issuance of travel orders, movement of dependents and household goods, and reimbursement for travel and transportation, have been expanded. Major changes are contained in sections 1, 2, 3, 5, and 7. These regulations are effective 1 August 1959 except where specifically stated otherwise. Changes issued will be effective upon receipt unless a specific date is indicated. See CPR A3.2-1.

3. Officials responsible for authorizing and approving travel of civilian employees and officials responsible for certification and payment of travel vouchers should familiarize themselves with these regulations. In order that the regulations may be administered properly, it is essential that the civilian personnel officer, the transportation officer, and the finance officer maintain CPR T3 on a current basis. The civilian personnel officer will make a periodic check with the transportation and finance officers to assure that they are furnished changes to CPR T3 and copies of items pertaining to civilian travel which are published in civilian personnel circulars.

By Order of Wilber M. Brucker, Secretary of the Army:

MAXWELL D. TAYLOR,
General, United States Army,
Chief of Staff.

Official:

R. V. LEE,
Major General, United States Army,
The Adjutant General.

Distribution:

Distribute in accordance with DA Form 12 requirements.

*These regulations supersede CPR T3, 28 June 1956, including C 2; 20 March 1957; C 4, 21 June 1957; C 5, 29 July 1957; C 8, 29 January 1958; C 10, 21 August 1958; and C 12, 12 March 1959. Item III, CPC 25, 1958, and CPC 43, 1958.

CPR T3.3

C. 2

12 October 1959

issuing official based on the factors listed in (a) through (g) below. When these factors do not outweigh the advantage of economy, comparative reimbursement rates will be considered in determining the mode of transportation. If common carrier is selected, travel orders will normally authorize travel by all types of common carrier. However, the order-issuing official may specify one type of common carrier (air, rail, bus, or water) to the extent that travel by any one is clearly *essential* to accomplishment of the identified by "XX" in the appropriate mission. This preferred mode will be box of DA Form 662 or noted on letter orders "directed when available." When a particular mode of travel is not essential, no preference will be indicated.

- (a) Urgency and purpose of travel and ability of each mode of transportation to provide necessary service in terms of such urgency.
 - (b) Amount of baggage or working equipment, necessary to accompany the traveler, and ability of each mode of transportation to handle.
 - (c) Accessibility of temporary duty stations by each mode of transportation, and reliability of service.
 - (d) Savings in the traveler's productive time (workdays only).
 - (e) Availability of first-class accommodations.
 - (f) Any special facilities or schedule which will aid in maintenance of necessary security.
 - (g) Savings to the Government in connection with PCS orders and transportation of dependents.
- (2) *Overseas travel.* Determination of the mode of transportation to be utilized for travel to, from, between, and within overseas areas will be made by the responsible transportation officer unless the order-issuing official has specified a particular mode as essential to the accomplishment of the mission, or has excluded a particu-

lar mode. The use of commercial transportation for such travel will not take precedence over the efficient and economical use of MATS or MSTs service. When MATS or MSTs is unavailable, the factors set forth in (1) above will govern determination of the mode of transportation to be utilized.

- (3) *Usual mode of transportation.* Where the term "usual mode of transportation" is used in these regulations it will be considered to mean travel by railway unless the travel orders specifically state otherwise, or rail transportation is not available. In the latter case it will be considered the mode(s) ordinarily utilized between the points involved.

TRAVEL BY GOVERNMENT CONVEYANCE

Government Auto

3-2. a. Where the needs of the service require, or where such mode is advantageous to the Government, travel may be authorized by Government automobile. The use of Government automobiles for official travel is governed by AR 58-5.

Military Aircraft

b. *Military Air Transport Service.* The movement and procurement of travel aboard Military Air Transport Service (MATS) flights is governed by AR 58-5. Procurement of travel aboard other military aircraft is governed by AR 96-20.

Military Sea Transportation Service

c. Arrangements and priorities for travel by the Military Sea Transportation Service (MSTS) are governed by AR 55-31 and AR 55-107.

TRAVEL BY TAXICAB AND SPECIAL CONVEYANCE

Transportation at Official Duty Station

3-3. a. Employees in a travel status may utilize taxicabs from place of abode or official post of duty to common carrier or other terminal, or from common carrier or other terminal to place of abode or official duty station. Such taxicab

12 October 1959

CPR T3.3

C 2

fares and those covered by *b* below are reimbursable in accordance with paragraph 7-5a. Administrative officials may restrict the use of taxicabs when suitable Government-owned or -leased or common carrier transportation facilities are available for all or part of the distance to or from terminals.

Transportation Outside Official Duty Station

b. Employees in a travel status may utilize taxicabs as indicated below:

- (1) Between the carrier terminal and the employee's place of business or place of lodging.
- (2) Between carrier terminals while en route when necessitated by change from one carrier to another.
- (3) Between carrier terminal and place of lodging and return in connection with unavoidable delays en route incident to transportation.
- (4) Between a temporary duty station and a place where meals are procured when suitable meals cannot be obtained at the temporary duty post. A statement of the necessity for such travel should accompany the travel voucher.

Special Conveyance

c. Special conveyances such as rented or hired automobiles, taxicabs (other than for use under *a* and *b* above), boats, aircraft, livery, or other means of transportation may be utilized by employees in a travel status if the use of such facilities is authorized in the travel orders or approved on the reimbursement voucher as advantageous to the Government. Taxicabs are considered special conveyances when they are utilized outside the official duty station for transportation between place of lodging and place of business or between places of business. The use of taxis between place of lodging and place of business or between places of business will not be authorized or approved when Government transportation is available.

TRAVEL BY PRIVATE CONVEYANCE

3-4. Employees or others rendering service to the Government, may be reimbursed for travel by private conveyance when engaged on official business wherever authorized or approved. Travel by private conveyance as owner or passenger may not be directed, but the use of such mode of transportation may be permitted when it is requested by the employee or encouraged when it is advantageous to the Government. Whenever possible, any necessary travel by private conveyance should be authorized in the travel orders, with the appropriate rate of reimbursement. Where such authorization is not made, the mode of travel may be approved, with appropriate notations or limitations, by approving the reimbursement voucher as provided in section 7. When a civilian employee elects to use a privately owned conveyance for official travel on a mileage basis, and such use is authorized or subsequently approved, the traveler will be reimbursed for the travel in accordance with paragraph 7-6. Local travel in the vicinity of the official duty station will be authorized in accordance with AR 55-34.

Rates of Reimbursement

a. (1) Temporary duty travel.

- (a) Mileage, at the rate of 5 cents a mile for use of privately owned motorcycles or 8 cents a mile for use of privately owned automobiles or airplanes will be paid for temporary duty travel by private conveyance authorized or approved as more advantageous to the Government. In such cases, the employee's place of residence from which he commutes daily to his official duty station may be authorized or approved as the point of beginning and ending temporary duty travel status if advantageous in performing the trip.

28 JUN. 1951

18 June 1959

CPR T3.3

TRANSPORTATION REQUESTS

General

3-9. *a.* Common carrier transportation and accommodations authorized civilian travelers generally will be obtained by the use of transportation requests. A transportation request is an order executed by an officially designated transportation officer or by a traveler designated as "acting transportation officer" upon a common carrier for transportation chargeable to the Government (par. 309002, AR 55-355). Transportation requests should not be used where the amount involved is a dollar or less. Travelers will be furnished transportation requests upon presentation of two copies of the travel orders to a transportation officer. In case of employees and/or dependents returning to the United States at Government expense from overseas locations, transportation requests for travel to destination in the United States will be issued by the appropriate CONUS Army terminal or aerial port of debarkation.

When Not Available

b. In an emergency when transportation requests are not available, and the traveler is unable to provide himself with transportation requests, he has the alternatives indicated below—

- (1) He may pay for the transportation and file a claim for reimbursement (par. 7-7b).
- (2) He may telegraph or telephone the administrative official responsible for the travel requesting that a transportation request be issued to cover the trip. The transportation request will be deposited by the administrative officer with the agent of the carrier at the point of issue. The agent will be asked to telegraph the agent from which the ticket is to be obtained that a transportation request to cover the travel has been received. The local agent will furnish the ticket.

When Cost is \$15 or Less

c. When the cost of transportation is \$15 or less, exclusive of Federal tax, the traveler may

either pay cash for such transportation or be issued a transportation request. If the traveler pays cash he will be reimbursed for the cost of the transportation, including Federal transportation tax. For example, if the cost of transportation is \$15 and Federal transportation tax is \$1.50, the traveler would be reimbursed \$16.50.

Superior Accommodations for Security Purposes

d. When superior accommodations are furnished in the interest of security as authorized in paragraph 3-5c, the following indorsement should be placed on the back of the transportation request:

"Superior accommodations authorized by CPR T3.3-5c)." When in the interests of security additional rail transportation is required for exclusive occupancy of the accommodations furnished, see paragraph 17, AR 55-21.

Acting Transportation Officer

e. When the authority issuing the travel orders determines that it is desirable for the civilian traveler to issue transportation requests for temporary duty travel, the orders will designate the civilian traveler as "acting transportation officer." The number of employees so designated will be held to a minimum, consistent with absolute necessity. For the additional requirements incident to such designation see section IV, AR 55-53.

Loss of Tickets

f. Whenever a civilian loses a transportation ticket or a ticket covering sleeping or seating accommodations or parts of such tickets issued in exchange for transportation requests, the provisions of paragraph 25b (1), (2), (3), and (5), AR 55-50 applicable to military members will obtain. Whenever transportation is furnished to a civilian employee under paragraph 25b (3), AR 55-50, in addition to the instructions contained therein, the civilian employee will be required to execute a certificate in duplicate stating he agrees, as a condition precedent to being furnished such transportation, that upon receipt of a statement showing the

18 June 1959

CPR T3.4

Section 4
Per Diem and Actual Expense Allowances

	Paragraph
Policy	4-1
Responsibilities	4-2
Per diem	4-3
Legal maximum per diem rates	4-4
Administrative per diem rates	4-5
Methods of prescribing per diem rates in travel orders	4-6
Actual expense allowance	4-7

POLICY
General

4-1. a. It is the policy of the Department of the Army that no employee or person shall be forced to bear the necessary cost of Government travel from personal funds nor should they be permitted to profit from such travel. To this end, rates of reimbursement within legal maxima should be so fixed as to approximate the necessary costs of official travel so that travelers are neither financially rewarded nor penalized by reason of travel status. If doubt arises because of possible conflict between these two principles, the conflict should be resolved in favor of the employee. Rates of reimbursement will be uniform for employees traveling under the same circumstances and conditions of travel. When there is a shortage of travel funds, travel requirements will be reexamined with a view toward reduction of travel rather than forcing employees to travel at an inequitable rate of per diem.

Use of Government Quarters

b. Where adequate Government quarters are available and their use would not be impracticable or interfere with the accomplishment of the purpose for which the travel was authorized, employees should be encouraged by their supervisors to utilize Government quarters in the interest of economy. Except as provided in paragraph 4-5d(4), however, *civilian employees may not be required to use Government quarters while in a travel status*. As used in these regulations "Government quarters" means sleeping accommodations in a facility (other than a mode of transportation) operated under United States control or supervi-

sion; by a foreign government under agreement or on a complimentary basis in behalf of the United States; or by a Government contractor under the terms of a contract or on a complimentary basis. "Government quarters" include guest houses, officers' clubs, operations hotels, BOQ, VOQ, or similar quarters facilities located at a military installation.

RESPONSIBILITIES

4-2. Commanding officers are responsible for action necessary to insure uniform and equitable applications of the principles and instructions in this section. Order-issuing officials are responsible for authorizing per diem rates that are justified by the circumstances of the travel and conditions of the assignment. Where the travel assignment warrants payment of an actual expense allowance (par. 4-7), order-issuing officials are responsible for securing the necessary authority or approval (par. 2-2c and 7-4).

PER DIEM

4-3. Per diem is a flat daily allowance authorized to be paid while employees or persons are in a travel status on official business. It is intended to offset the necessary subsistence costs of travel not otherwise reimbursable. It is paid in lieu of expenses for all charges for meals, lodging, personal use of room during daytime, baths, all fees and tips to waiters, porters, baggagemen, bell boys, hotel maids, dining room stewards and others on vessels, hotel servants in foreign countries, telegrams and telephone calls reserving hotel accommodations, laundry, cleaning and pressing of clothing, fans and fires in rooms, and transportation

CPR T33

18 June 1959

Parlor Car and Coach Accommodations

b. One seat in a sleeping or parlor car is authorized unless the travel order or other administrative determination specifies that coach accommodations will be used. Where adequate coach accommodations are available, officials responsible for directing travel will take steps to see that coach accommodations are used to the maximum extent possible on the basis of advantage to the Government, suitability and convenience to the traveler, and the nature of the business involved.

Dependents

c. Accommodations for dependents of civilian employees traveling at Government expense will be as provided for dependents of military personnel in AR 55-21.

**ACCOMMODATIONS ON COMMERCIAL
AIRCRAFT**

First Class and Aircoach

3-7. a. One first-class seat will be allowed for air travel unless the travel orders specify that aircoach or air tourist accommodations are to be used.

Sleeper Plane

b. One standard lower berth on airplanes having sleeper accommodations may be authorized in the orders or subsequently approved when night travel of six or more hours of elapsed time is involved and it is necessary for the employee to use such flight.

Air Taxi Service

c. Air taxi service may be secured in accordance with AR 55-355.

**ACCOMMODATIONS ON COMMERCIAL
VESSELS**

3-8. When travel by commercial vessel is authorized (see AR 55-31), transportation at the lowest first-class rate and the lowest first-class stateroom will be allowed on vessels when it is not included in the cost of the passage ticket. Accommodations on steamers should be applied for at the earliest practicable time after receipt of the travel orders.

Stateroom Accommodations

a. Minimum first-class accommodations will be allowed when stateroom is included in cost of passage, or where the stateroom is a separate charge, except that the lowest first-class accommodation available will be allowed when notation is made on the travel expense voucher that the accommodation superior to minimum first-class was the lowest available at the time the reservation was made. The notation will be accepted as *prima-facie* evidence and becomes a part of the certificate signed by the payee on the face of his travel expense voucher. The procedures outlined in paragraph 29, AR 55-21 will be followed; the transportation request will be drawn on the carrier for such service for civilian employees or dependents at "lowest rate" except as provided above.

Baltimore Steam Packet Company

b. Berth accommodation in the lowest first-class rate outside stateroom on boats operated by the Baltimore Steam Packet Company will be furnished to civilian employees traveling on official business.

Travel by American Ships

c. Section 901, Merchant Marine Act of 1936 (49 Stat. 2015; 46 U.S.C. 1241), provides—

Any officer or employee of the United States traveling on official business overseas or to or from any of the possessions of the United States shall travel and transport his personal effects on ships registered under the laws of the United States where such ships are available unless the necessity of his mission requires the use of a ship under a foreign flag: Provided, that the Comptroller General of the United States shall not credit any allowance for travel or shipping expenses incurred on a foreign ship in the absence of satisfactory proof of the necessity therefor.

If the mission of the employee concerned is considered of sufficient importance to warrant the use of a ship under a foreign flag, authorization therefor must appear in the travel orders or explanation for the use of the foreign ship must accompany the traveler's expense voucher. In the event that the travel is not authorized in advance, administrative approval of the expense voucher will constitute evidence of the necessity therefor.

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tion space, the Pullman Company reserves the right to transfer the person to such berth accommodations when the room space is in demand by passengers who will pay regular tariff rates. Such transfer, however, will not be made during hours when passengers have retired nor will passengers be transferred to lower rated berth space than called for on the transportation request.

f. Alternate Honoring in All-Room Space. The special arrangement set forth in *d* above does not affect the tariff rule of the Pullman Company which provides that in regular or extra-in-line service where berth accommodations are not available, berth space will be furnished in room accommodations in cars which contain both berths and rooms upon collection of the regular tariff berth rate.

304009 Routing. a. Equalized Routes. The tariffs of the commercial carriers (air, bus, and rail) in many instances publish two or more different routes between two points at the same fare. In some instances additional routes are published at higher fares. Any route between two points via which the lowest net fare will apply is considered an equalized route. (See carriers' agreement listed in paragraph 302001.)

b. Bus and Rail. Agreements with the bus and rail carriers, subject to certain exceptions, provide that the lowest net fares or charges established via any route will be equalized via all ticketing routes between the two points, provided both the route used to establish the lowest net fare or charge and the route of travel are recognized as usually traveled routes.

c. Additional Subsistence. There may be additional expenses to the Government for subsistence over some equalized routes that have a longer schedule, but such additional expenses, if not excessive, are permitted in order to allow a division of business among competing carriers which are parties of the military agreements.

d. Air. The agreement with the scheduled air carriers provides for equalization of first class fares via routes for which the published fare does not exceed by more than 10 percent the first class fare or rate via the direct route.

e. Usually Traveled Routes. A usually traveled route is one authorized in a lawfully filed tariff over which it would actually be practicable and economical to route individuals, special cars or special trains. More detailed information regarding equalization and usually traveled routes is contained in current agreements with commercial carriers.

304010 Circuitous Routes. a. General. Indirect routes between any two points at a higher fare than that at which the lowest net fare is equalized are considered circuitous routes.

b. When To Be Used. Circuitous routes may be used when necessary to provide satisfactory service to meet military requirements.

c. When Not To Be Used. Travelers will not be furnished transportation via circuitous routes at Government expense for personal convenience.

304011 Air Taxi Service. a. Authorization. The services of air taxi operators who offer such service in accordance with published rates may be utilized for the transportation of personnel, limited to the load carrying capacity of the air taxi operator's plane, from a point of origin having no scheduled air transportation service to the nearest airport having scheduled air transportation service, or to a point of destination having no scheduled air transportation service from the nearest airport having scheduled air transportation service, when—

- (1) An emergency requires the use of such transportation services; or
- (2) There is no surface carrier authorized to render the transportation or the services of authorized surface carriers are inadequate; or
- (3) In the judgment of the order authorized authority, the interest of the Government will be better served. A statement must be included in the orders that such service is authorized or approved as advantageous to the Government.

b. Procurement. Air taxi service will be procured by Government transportation requests. A statement will be placed on the reverse of the transportation request by the issuing officer to indicate, "Air taxi service \$-----."

Title 14—Aeronautics and Space

§ 60.30

§ 60.26 Flight crew members at controls.

All required flight crew members when on flight deck duty shall remain at their respective stations while the aircraft is taking off or landing, and while en route except when the absence of one such flight crew member is necessary for the performance of his duties in connection with the operation of the aircraft. All flight crew members shall keep their seat belts fastened when at their respective stations.

(Sec. 313(a), 72 Stat. 752; 49 U.S.C. 1354(a). Interpret or apply secs. 307, 601, 72 Stat. 749, 775; 49 U.S.C. 1348, 1421) [Amdt. 60-15, 24 F.R. 3155, Apr. 23, 1959; 24 F.R. 3956, May 15, 1959]

§ 60.27 Aircraft speed.

A person shall not operate an arriving aircraft at an indicated airspeed in excess of 250 knots (288 m.p.h.) during flight below 10,000 feet mean sea level within 30 nautical miles of an airport where a landing is intended or where a simulated approach will be conducted unless the operating limitations or military normal operating procedures require a greater airspeed, in which case the aircraft shall not be flown in excess of such speed.

(Sec. 307 of the Federal Aviation Act of 1958; 72 Stat. 749; 49 U.S.C. 1348) [Amdt. 60-33, 26 F.R. 10753, Nov. 17, 1961]

§ 60.28 Avoidance of disaster areas.

(a) Whenever the Administrator determines it to be necessary, the airspace below 2,000 feet above the surface over and within five statute miles of an aircraft or train accident, forest fire, earthquake, flood, or other disaster of substantial magnitude will be designated a disaster area. Designation will be made in a Notice to Airmen.

(b) Aircraft may not be flown within a disaster area except under the following conditions:

(1) Aircraft participating in airborne relief activities may be operated under the direction of the Agency responsible for relief activities.

(2) Aircraft may be operated to or from an airport within the area if they do not hamper or endanger relief activities.

(3) When flight around or above the area is impractical due to weather, terrain, or other considerations, aircraft may be operated en route through the area if they do not hamper or endanger relief activities and prior notice is given

to the Air Traffic Service facility specified in the Notice to Airmen.

(4) Aircraft may be operated through the area when specifically authorized under an IFR air traffic control clearance.

(5) Aircraft carrying properly accredited news representatives or persons on official business pertaining to the disaster may be operated within the area. However, they shall be operated in accordance with § 60.17 and other applicable Civil Air Regulations and they may not be operated at or below altitudes being used by relief aircraft unless they have the specific approval of the Agency responsible for relief activities. Such approval, together with any special instructions, will normally be obtained through the Air Traffic Service facility specified in the Notice to Airmen. A flight plan containing the following shall be filed for news media and official business aircraft prior to operating in a disaster area:

(i) Aircraft identification, type, and color;

(ii) Radio communications frequencies to be used;

(iii) Proposed time of entry and exit of the disaster area;

(iv) Name of news media or other purpose of flight, and

(v) Any other information deemed necessary by air traffic control.

(Sec. 307, 72 Stat. 749, 49 U.S.C. 1348) [Amdt. 60-30, 27 F.R. 12615, Dec. 20, 1962, effective Mar. 20, 1963]

VISUAL FLIGHT RULES (VFR)

§ 60.30 Basic VFR minimum weather conditions.

Aircraft shall not be flown VFR in weather conditions below those specified herein except as provided in § 60.31. When VFR flight operations are conducted in accordance with the provisions of § 60.32 at an altitude coincident with the designated base of the continental control area, control area or transition area, the visibility and clearance-from-cloud requirements applicable to the immediately underlying airspace shall govern.

(a) Clearance from clouds—(1) In controlled airspace. Aircraft shall not be flown VFR less than 500 feet vertically under, 1,000 feet vertically over, and 2,000 feet horizontally from any cloud formation except that, in the continental control area, aircraft shall not

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be flown VFR less than 1,000 feet vertically and one mile horizontally from any cloud formation. Aircraft shall not be flown VFR within a control zone beneath the ceiling when the ceiling is less than 1,000 feet.

(2) *Outside controlled airspace.* When at an altitude of more than 1,200 feet above the surface, aircraft shall not be flown VFR less than 500 feet vertically under, 1,000 feet vertically over, and 2,000 feet horizontally from any cloud formation. When at an altitude of 1,200 feet or less above the surface, aircraft flown VFR shall be flown clear of clouds.

(b) *Visibility within controlled airspace—(1) Control zones.* When the flight visibility is less than 3 miles, no person shall operate an aircraft VFR in flight within a control zone. When the ground visibility is less than 3 miles, no person shall take off or land an aircraft or enter the traffic pattern of an airport within a control zone.

(2) *Control area.* When the flight visibility is less than 3 miles, no person shall operate an aircraft VFR in flight within a control area.

(3) *Transition area.* When the flight visibility is less than three miles, no person shall operate an aircraft VFR within a transition area.

(4) *Continental control area.* When the flight visibility is less than 5 miles, no person shall operate an aircraft VFR in flight within the continental control area.

(c) *Flight visibility outside controlled airspace.* No person shall operate an aircraft VFR in flight when the flight visibility is less than one mile. However, helicopters may be flown at or below 1,200 feet above the surface when the flight visibility is less than one mile, if operated at such reduced speed as to give the pilot of such helicopter adequate opportunity to see other air traffic or any other obstruction in time to avoid collision.

NOTE: The minimum weather conditions prescribed in this section for flight in controlled airspace are those within which a pilot is expected to be able to observe and avoid other air traffic. When operating in weather conditions equal to or above those specified herein, irrespective of the type of flight plan an aircraft may be operated under, i. e., IFR or VFR, the primary responsibility for the avoidance of collision rests with the pilot. It should be recognized that the criteria contained herein prescribe the "minimums" required for VFR flight.

Good operating practice requires that regular or continued flight in near minimum weather conditions be avoided.

(Secs. 313(a), 307, 72 Stat. 752, 749; 49 U.S.C. 1354(a), 1348) [Amdt. 60-11, 23 F.R. 6175, Aug. 12, 1958, as amended by Amdt. 60-21, 26 F.R. 571, Jan. 20, 1961; Amdt. 60-22, 23 F.R. 1030, Feb. 2, 1961; Amdt. 60-23, 26 F.R. 1398, Feb. 17, 1961]

§ 60.30-1 Authorization by Air Traffic Control (FAA policies which apply to § 60.30).

Authorization by Air Traffic Control to enter or depart control zones under VFR when the ceiling is less than 1,000 feet, and to fly closer to clouds than 500 feet vertically below, 1,000 feet vertically above, and 2,000 feet horizontally within a control zone will be issued in the form of an air traffic clearance. This clearance may be obtained by contacting the Airway Communications Station or airport control tower in the control zone concerned. An appropriate clearance for such flight should conform closely to the following example:

ATC clears (aircraft ident.) out of/to enter control zone (number of) miles (direction) of (airport) cruise not above (altitude) while in control zone.

[Supp. 19, 20 F. R. 2523, Apr. 16, 1955]

§ 60.31 Special VFR minimum weather conditions in control zones.

When a clearance is obtained from air traffic control, aircraft may be flown VFR within a control zone when the weather conditions are below the basic minimums specified in § 60.30 subject, however, to special weather minimums as follows:

(a) *Visibility.* When the flight visibility is less than one mile, no person shall operate an aircraft VFR, other than a helicopter, in flight within a control zone. When the ground visibility is less than one mile, no person shall take off or land an aircraft VFR, other than a helicopter, at an airport within a control zone.

(b) *Clearance from clouds.* No person shall operate an aircraft VFR in flight within a control zone unless clear of clouds.

NOTE: With respect to this section, an air traffic clearance obtained under these provisions does not constitute authority for the pilot to deviate from § 60.17 or any other applicable provision of the Civil Air Regulations.

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BASIC VFR MINIMUMS		
	Visibility	Distance from clouds
Control zone	3 miles ¹	500 feet under ² 1,000 feet over ² 2,000 feet horizontally and 1,000-foot ceiling
Control area and transition area	3 miles	500 feet under 1,000 feet over 2,000 feet horizontally
Continental control area	3 miles	1,000 feet under 1,000 feet over 1 mile horizontally
Outside controlled airspace	1 mile ³	1,200 feet or below
		Above 1,200 feet
		Clear of clouds
		500 feet under 1,000 feet over 2,000 feet horizontally

¹ If traffic conditions permit, Air Traffic Control will issue an air traffic clearance for flight within a control zone when the weather conditions are less than above. However, no person shall operate an aircraft VFR, other than a helicopter, irrespective of any clearance, unless the visibility is 1 mile. All flights shall remain clear of clouds.

² Helicopters are excepted from the 1 mile requirement when operated at or below 1,200 feet and at reduced airspeed (see § 61.30).

(Secs. 313(a), 307, 72 Stat. 752, 749; 49 U.S.C. 1354(a), 1348) [Amdt. 60-11, 23 P.R. 6178, Aug. 12, 1958; as amended by Amdt. 60-17, 25 P.R. 1987, Mar. 8, 1960; Amdt. 60-21, 26 P.R. 571, Jan. 20, 1961]

§ 60.31-1 Air traffic clearance for take-off or landing (FAA policies which apply to § 60.31).

A VFR takeoff or landing may be made at an airport within a control zone when the flight or ground visibility is less than 3 miles only if an air traffic clearance has been received. A takeoff or departure clearance will normally contain specific instructions as to the direction of take-off, turn after takeoff, track and altitude to be maintained, and any other necessary maneuver.

[Supp. 19, 20 P. R. 2823, Apr. 16, 1955]

§ 60.32 VFR cruising altitudes.

When an aircraft is operated in level cruising flight at 3,000 feet or more above the surface, the following cruising altitudes, or the equivalent flight levels, whichever is appropriate, shall be observed:

(a) Below 29,000 feet. At an altitude appropriate to the magnetic course being flown as follows:

(1) 0° to 179° inclusive, at odd thousands plus 500 (3,500; 5,500; etc.).

(2) 180° to 359° inclusive, at even thousands plus 500 (4,500; 6,500; etc.).

(b) Above 29,000 feet. At an altitude appropriate to the magnetic course being flown as follows:

(1) 0° to 179° inclusive, at 4,000-foot intervals beginning at 30,000 (30,000; 34,000; etc.).

(2) 180° to 359° inclusive, at 4,000-foot intervals beginning at 32,000 (32,000; 36,000; etc.).

Note: When an aircraft is holding in a one or two minute holding pattern or when it is turning, it is not considered to be in level cruising flight.

(Secs. 313(a), 307, 72 Stat. 752, 749; 49 U.S.C. 1354(a), 1348) [Amdt. 60-10, 23 P.R. 4138, June 12, 1958, as amended by Amdt. 60-13, 23 P.R. 9344, Dec. 10, 1958; Amdt. 60-19, 28 P.R. 7015, July 23, 1960]

§ 60.33 VFR flight plan.

If a VFR flight plan is filed, it shall contain such of the information listed in § 60.41 as air traffic control may require.

Note: Although flight plans are not required for VFR flight, air traffic control will accept such flight plans when desired by the pilot. Flights proceeding over sparsely populated areas or mountainous terrain may thus take advantage of any search and rescue facilities which may be available in emergencies. The information contained in such a flight plan is of importance to search and rescue operations.

§ 60.33-1 VFR flight plans (FAA policies which apply to § 60.33).

(a) VFR flight plans may be filed in person or by telephone or radio with any Airway Communications Station or control tower operator.

(b) Good operating practices in connection with planning a flight, filing flight plan, flying the flight plan, carrying out radio communications procedures for all purposes can be found in the FAA Technical Manual No. 102, "Pilots' Radio Handbook."

[Supp. 19, 20 P. R. 2824, Apr. 16, 1955]

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may proceed when a landing at the point of first intended landing becomes inadvisable.

Balloon. An aircraft, excluding moored balloons, without mechanical means of propulsion, the support of which is derived from lighter-than-air gas.

Basic airworthiness. "Basic airworthiness" means the structural integrity and controllability of an aircraft as determined by the pilot in normal flight maneuvering such that there is no reasonable probability of failure which would endanger persons or property.

Ceiling. The height above the ground or water of the lowest layer of clouds or obscuring phenomena that is reported as "broken," "overcast," or "obscuration" and not classified as "thin" or "partial."

Controlled airspace. Airspace of defined dimensions designated in Part 601 of this title as continental control area, control area, control zone or transition area, within which air traffic control is exercised.

Continental Control Area. The Continental Control Area consists of the airspace of the continental United States at and above 14,500 feet MSL but excludes: (1) The State of Alaska, (2) the airspace less than 1,500 feet above terrain, and (3) prohibited and restricted areas except those restricted areas specified in Part 601 of this title.

Control area. Unless otherwise provided in appropriate cases, control areas extend upward from 700 feet above the surface until designated from 1,200 feet above the surface or from at least 500 feet below the MEA, whichever is higher, to the base of the continental control area.

Control zone. Control zones extend upward from the surface. A control zone may include one or more airports and is normally a circular area of 5 statute miles in radius with extensions where necessary to include instrument approach and departure paths.

Cruising altitude. Cruising altitude is a level determined by vertical measurement from mean sea level.

Expected approach time. The time at which it is expected that an arriving aircraft will be cleared to commence approach for a landing.

Flight level. Flight level is a level of constant atmospheric pressure related to a reference datum of 29.92" Hg. For example, flight level 250 is equivalent to

an altimeter indication of 25,000 feet, and flight level 265 to 26,500 feet.

Flight plan. Specified information filed either verbally or in writing with air traffic control relative to the intended flight of an aircraft.

Flight test. "Flight test" means flight for the purpose of investigating or checking the operational capabilities of a new type of aircraft, engine, or propeller, the airworthiness of which has not been determined by appropriate military or civil authority; or flights of production aircraft until the basic airworthiness of the aircraft, engine, or propeller contemplated by the appropriate production specification or type certificate is determined by the pilot; or flights involving aircraft, engines, or propellers following major alteration, as defined in Part 18 of this subchapter, until the basic airworthiness of the aircraft, engine, or propeller has been determined by the pilot.

Flight visibility. The average horizontal distance that prominent objects may be seen from the cockpit.

Glider. An aircraft without mechanical means of propulsion, the support of which in flight is derived dynamically from the reaction on surfaces in motion relative to the air.

Ground visibility. The average range of vision in the vicinity of an airport as reported by the U. S. Weather Bureau or, if unavailable, by an accredited observer.

Helicopter. A type of rotorcraft the support of which in the air is normally derived from airfoils mechanically rotated about an approximately vertical axis.

IFR. The symbol used to designate instrument flight rules.

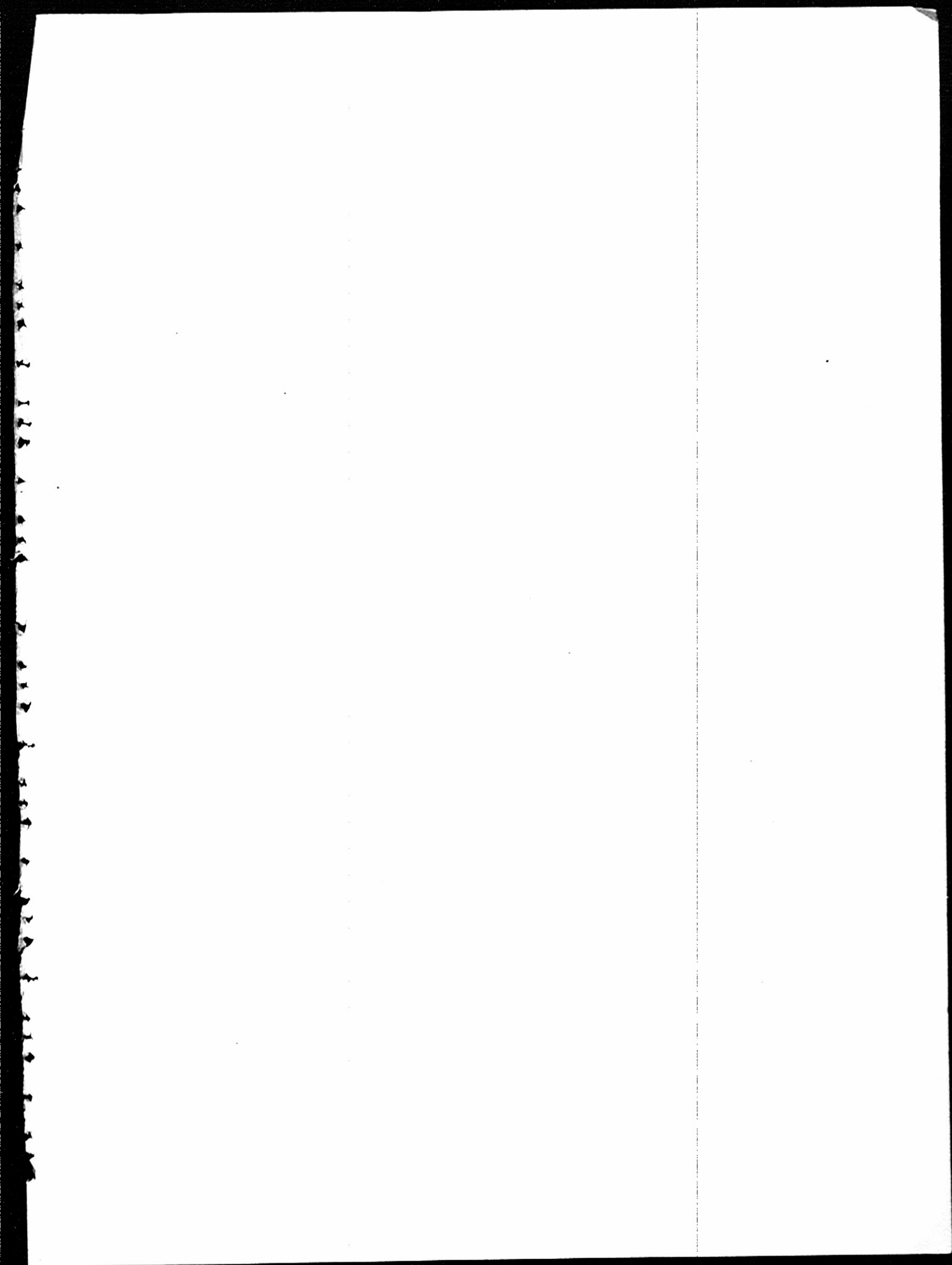
IFR conditions. Weather conditions below the minimum prescribed for flights under VFR.

Large aircraft. Aircraft of more than 12,500 pounds maximum certificated take-off weight.

Magnetic course. The true course or track, corrected for magnetic variation, between two points on the surface of the earth.

MEA. The minimum en route IFR altitude applicable to a particular route or route segment, from radio fix to radio fix, as specified in Part 610 of this title.

Person. Means an individual, firm, copartnership, corporation, company, association, joint-stock association, or body politic; and includes any trustee,



United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 16 1964

BRIEF FOR APPELLEE

Nathan J. Paulson
CLERK

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,815

MUTUAL BENEFIT HEALTH AND
ACCIDENT ASSOCIATION,

Appellant,

v.

MRS. JOSEPHINE L. MESSINA,

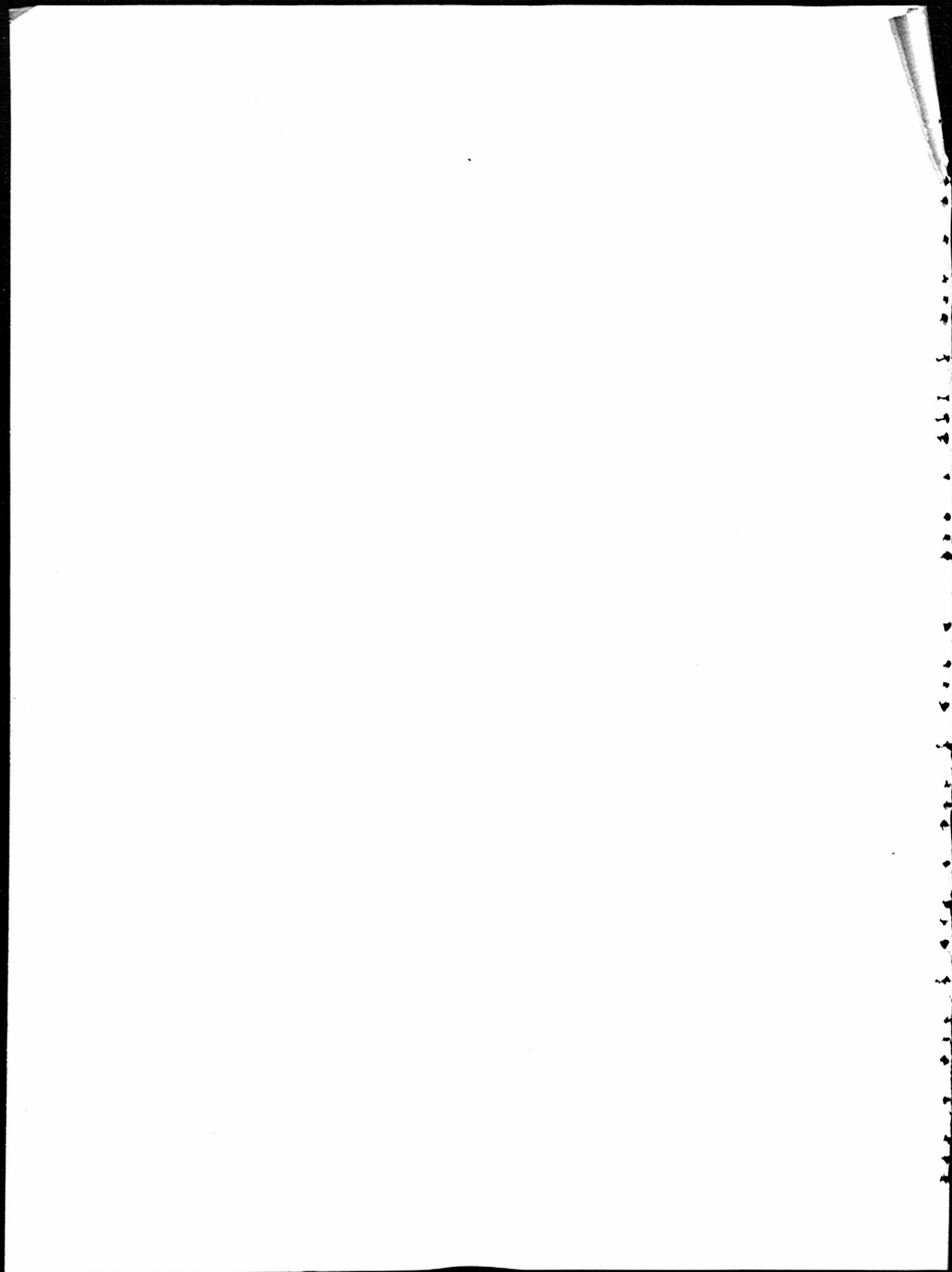
Appellee.

*Appeal From The United States District Court
For The District of Columbia*

THOMAS S. JACKSON
ROBERT M. GRAY
JOHN L. LASKEY
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Washington, D. C.

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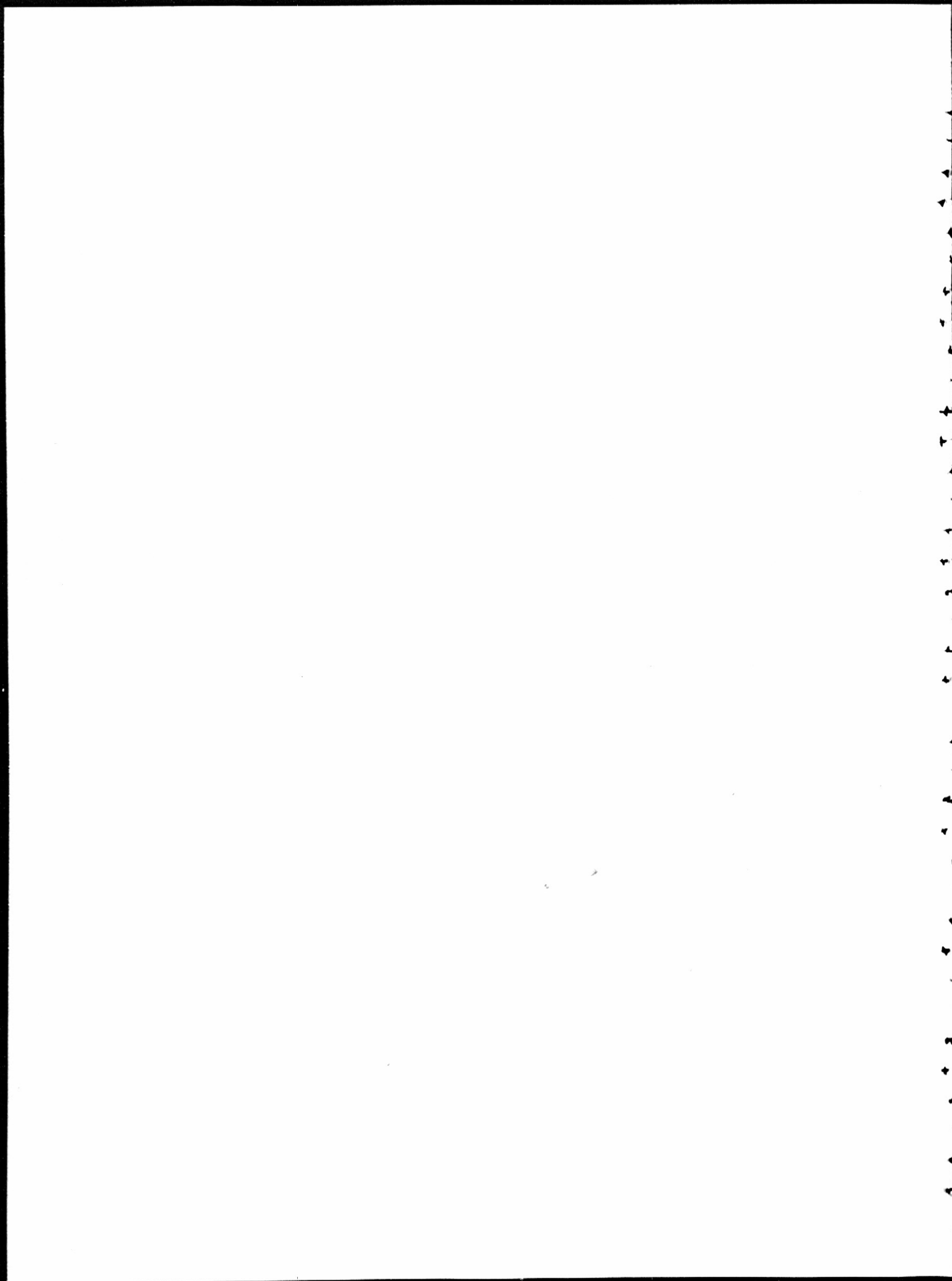


(i)

QUESTIONS PRESENTED

In the opinion of appellee, the questions presented are:

1. Would an average person in the position of the insured have understood that the insurance policy covered his entire air trip from Tachikawa Air Force Base, Japan, to Washington, D. C.?
2. Did the insured's death occur on a "regular, special or chartered flight by, or contracted for by, the Military Air Transport Service (MATS) of the United States" so as to be within the scope of one of the provisos of the policy?
3. Did the trial court err in applying American law in the interpretation of an insurance policy purchased by a citizen and resident of the United States, from an American insurance company at a United States Air Force Base, in Japan, which policy named a citizen and resident of the United States as beneficiary?
4. Did the trial court err in awarding interest to appellee from the date of the appellant insurance company's refusal to pay the sum due upon the insurance policy?



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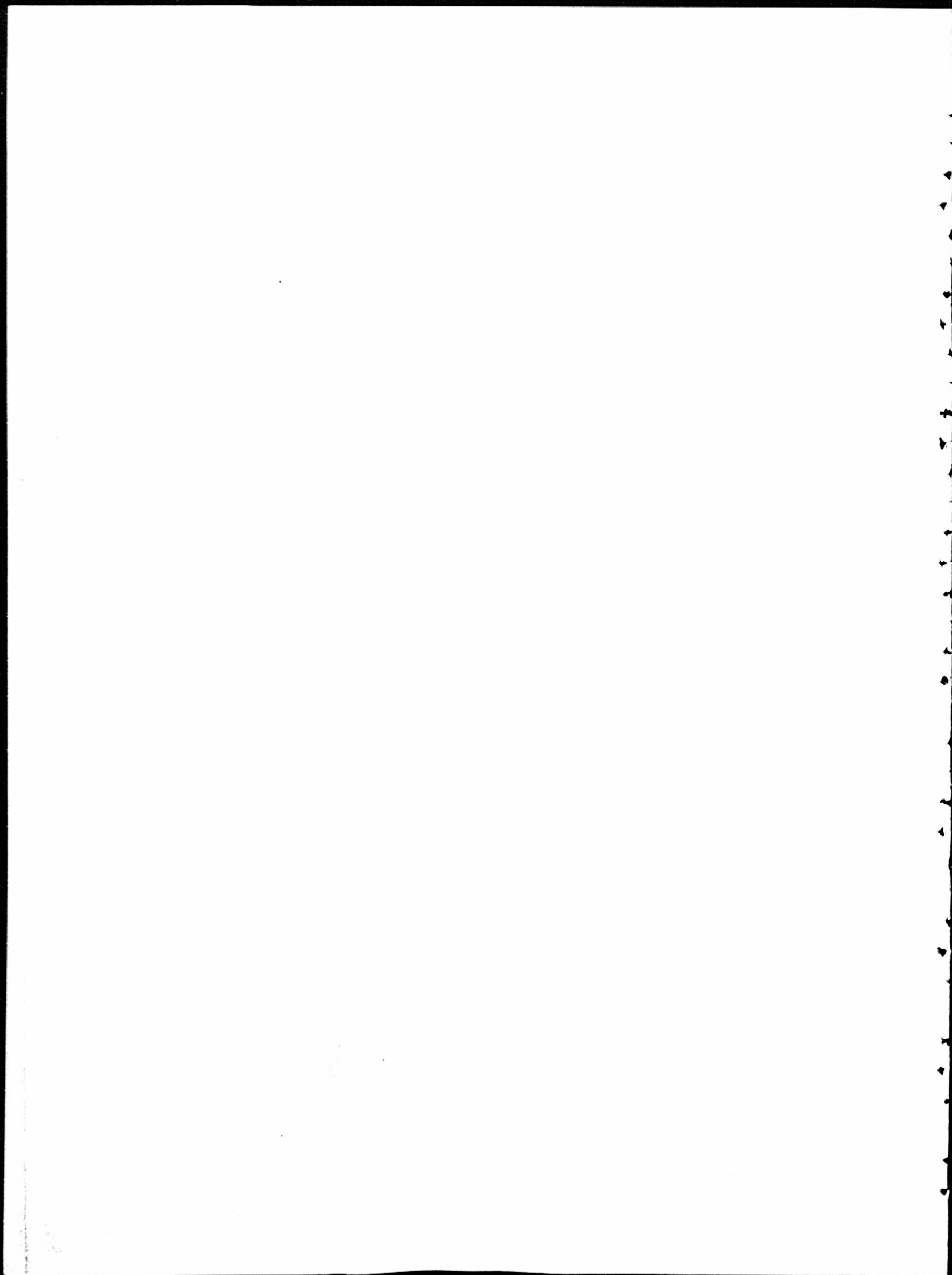
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,815

**MUTUAL BENEFIT HEALTH AND
ACCIDENT ASSOCIATION,**

Appellant,

v.

MRS. JOSEPHINE L. MESSINA,

Appellee.

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In January, 1960, appellee's husband, Salvatore Messina, was employed as a construction representative by the Corps of Engineers, Department of the Army, in Seoul, Korea (J.A. 90). Due to a reduction in force, Mr. Messina was ordered to return to his home in Brentwood, Maryland. His travel from Seoul, Korea, to Brentwood, Maryland, was undertaken pursuant to U. S. Government travel orders and he was considered by his official superior to be in duty status

until he reached his home (J.A. 90-92). While en route, Mr. Messina purchased, at Tachikawa Air Force Base, Japan, a policy of insurance issued by appellant in the face amount of \$50,000.00 and naming appellee as beneficiary. Its physical composition was such that it was obviously intended to be mailed by the insured. The insured did mail the policy from Tachikawa Air Force Base, Japan, to his wife at her home in Brentwood, Maryland. (J.A. 74-75, 86-89)

This policy is a four-page printed document, in a form more or less familiar to air travellers.

At the top of the first page appears the following:

"This Policy Is Nonrenewable and Provides Benefits for Loss of Life, Limb or Sight and Other Specified Losses Resulting From Accidental Bodily Injuries Received While a Passenger on Scheduled Airlines and Other Specified Conveyances or While on the Premises of an Airport to the Extent Herein Provided."

Below this language is a "Schedule" consisting of blanks in which are written the name and address of the insured and beneficiary, the point of departure (Tachikawa Air Force Base, Japan), the destination (Washington, D. C.) the principal sum (\$50,000.00) effective date (January 25, 1960) and the premium (\$4.00).

Below these blanks is the following language:

"In consideration of the payment of the premium shown in the Schedule, the Association, subject to the provisions, limitations and exceptions of this policy, hereby insures the person named as Insured in the Schedule against loss of life, limb or sight and other specified losses resulting, independently of all other causes, from injuries. The term 'injuries' wherever used in this policy, shall mean accidental bodily injuries received during any portion of the first one way or round trip which is made by the Insured, while this policy is in force, between the Point of Departure and the Destination

designated in the Schedule and for which the Insured has purchased a transportation ticket or has been issued a pass; provided such injuries are received (1) while riding as a passenger in boarding or alighting from, or being struck by an aircraft operated on a regular, special or chartered flight (a) by a scheduled airline of United States Registry holding a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board of United States of America or its successors, (b) by an intrastate scheduled airline of United States Registry maintaining regular published schedules and licenses for the transportation of passengers by a duly constituted authority having jurisdiction over civil aviation in the state in which said airline operates, (c) by a scheduled airline of foreign registry maintaining regular published schedules and licensed for transportation of passengers by the duly constituted governmental authority having jurisdiction over civil aviation in the country of registry of such airline, (d) by, or contracted for by, the Military Air Transport Service (MATS) of the United States, (e) by the Royal Canadian Air Force Air Transport Command or the Royal Air Force Air Transport Command of Great Britain, or (f) by the 315th or 322nd Air Divisions or the 5060th Transportation Squadron of the United States Air Force; or (2) while in or upon any premises or surface vehicle used for passengers and provided or arranged for by such airline or the authorities controlling an established airport, but only while the Insured is in or upon such premises or surface vehicle for the purpose of beginning, continuing or completing the airtrip designated in the Schedule." (J.A. 86-87)

Faintly visible, stamped in pale green ink, superimposed over a part of the printed language above set out, is the following legend:

"Read Carefully

"This Policy is limited to aircraft accidents on scheduled airlines." (J.A. 86-87)

After purchasing this policy Mr. Messina flew from Tachikawa Air Force Base, Japan, to Travis Air Force Base, California, on a

plane operated by Overseas National Airways, a commercial air-carrier, pursuant to a contract with the Military Air Transport Service (hereinafter sometimes called "MATs"), arriving on January 25, 1960, at Travis Air Force Base, California. (J.A. 28, 83-84) At Travis Air Force Base, Mr. Messina arranged for the rest of his journey from Japan to Washington, D. C., by purchasing for \$15.00 cash a ticket on a flight operated by Travis Transportation Company, Inc. from Travis Air Force Base to San Francisco International Airport and also with a Government transportation request, a ticket on a United Airlines flight from San Francisco International Airport to Washington, D. C. (J.A. 28, 54, 55)

The plane operated by Travis Transportation Service crashed en route to San Francisco International Airport and Mr. Messina suffered fatal injuries. (J.A. 44) Appellee, Mr. Messina's widow, gave timely notice and proof of loss to appellant and on March 16, 1960, appellant notified appellee, through her attorney, that it had denied her claim upon the ground that Mr. Messina was not covered by the policy at the time of his death. (J.A. 44, 117)

The flight of the Travis Transportation Company occurred, and was contracted for by MATs under the following circumstances: Almost a year before Mr. Messina's death, February 2, 1959, Colonel Charles W. Stark, U. S. Air Force, who was the Base Commander of Travis Air Force Base and the Commanding Officer of the Fifth Air Base Group, a component unit of the Military Air Transport Service of the United States, wrote a letter to the Regional Director, Military Traffic Management Agency, Western Traffic Region, Oakland, California, requesting that negotiations be undertaken with Travis Transportation Company, Inc., then doing business as "Travis Air Service," to establish an air taxi service from Travis Air Force Base to Oakland Municipal Airport and San Francisco International Airport. (J.A. 20-25) This letter described the existing surface transportation

services from Travis to the Oakland and San Francisco airports as "inadequate," detailed at length the reasons why the institution of an air taxi service would be advantageous to the Government, and concluded that air taxi service was required on a permanent basis at Travis Air Force Base. (J.A. 20-25)

On February 27, 1959, Colonel Stark and Travis Transportation Company, Inc. signed a document pursuant to which air taxi service was inaugurated at Travis Air Force Base. (J.A. 97-104) This document, together with "Supplement Number One" and "Change Number One" bearing the same date as the basic document, provided, among other things, that Travis Transportation Company, Inc., could use the landing and aircraft parking facilities of the Air Base to provide an air taxi service to the San Francisco Bay area. The seating priority and maximum prices were prescribed. It was provided that aircraft must depart not later than two hours after one passenger had been obtained. (J.A. 98) Strict safety standards were imposed, including a requirement that only multi-engine aircraft be used, that passengers would wear seat belts at all times when the aircraft was in motion, that the visibility must be at least three miles on the ground and five miles at cruising altitude, and that the ceiling must be at least fifteen hundred feet. (J.A. 103-104) The agreement provided that it would remain effective until terminated by mutual consent, by either party unilaterally upon thirty days' written notice or by the Commander of Travis Air Force Base upon non-compliance by Travis Transportation Company, Inc., with any of the terms of the document, or when the Base Commander determined that an emergency condition existed or that operational necessity dictated. (J.A. 97-98)

At all times, both before and at the trial, and in the trial brief submitted at the request of the court, counsel for appellee contended that the insurance policy on its face led the insured to believe that it provided coverage for accidental death occurring during any portion of the insured's air trip from Tachikawa Air Force Base, Japan, to Wash-

ington, D. C., irrespective of the technically drawn provisos which followed the insuring clause of the policy. In addition, appellee always contended, as it does now, that the fatal flight was one "contracted for by the Military Air Transport Service (MATS) of the United States" and thus fell within the express language of proviso (1)(d).

At the conclusion of appellee's evidence appellant rested, and presented no evidence, although the trial court gave appellant's counsel the opportunity to do so, even after appellee's trial brief had been filed. (J.A. 83) Thus, there is no evidence that there were any other types of policy available; that Messina had any special reason to believe he was going beyond his coverage when he took the Travis flight; or even that he knew, or was on notice, that the Travis flight was not a scheduled commercial flight. If there was any sign of warning that Travis was not within the normal coverage of such policies, there is no evidence to show it; nor was there any evidence that any other adequate means of transportation between these two airports was available; nor was there any evidence that, when Messina bought the policy in Japan he had any reason to know there would be any part of his air journey which did not fit the policy.

STATUTES AND REGULATIONS INVOLVED

Title 28, Sec. 2701, District of Columbia Code (1961 Edition).

"The rate of interest in the District upon the loan or forbearance of any money, goods, or things in action, and the rate to be allowed in judgments and decrees, in the absence of express contract as to such rate of interest, shall be six dollars upon one hundred dollars for one year, and at that rate for a greater or less sum or for a longer or shorter time: *Provided*, that interest, when authorized by law, on judgments against the District of Columbia, shall be at the rate of not exceeding 4 per centum per annum."

Title 28, Sec. 2707.

"In an action in the United States District Court for the District of Columbia to recover a liquidated debt on which interest is payable by contract or by law or usage the judgment for the plaintiff shall include interest on the principal debt from the time when it was due and payable, at the rate fixed by the contract, if any, until paid."

Title 28, Sec. 2708.

"In an action to recover damages for breach of contract the judgment shall allow interest on the amount for which it is rendered from the date of the judgment only; but nothing herein shall forbid the jury, or the court, if the trial be by the court, from including interest as an element in the damages awarded, if necessary to fully compensate the plaintiff. In an action to recover damages for a wrong the judgment for the plaintiff shall bear interest."

Code of Federal Regulations.

14. CFR 91.105(a)(1).

" * * *. Aircraft shall not be flown VFR beneath the ceiling when the ceiling is less than 1,000 feet.

14. CFR 91.105(b).

"Visibility within controlled air-space — (1) control zones. When the flight visibility is less than 3 miles, no person shall operate an aircraft VFR in flight within a control zone. When the ground visibility is less than 3 miles, no person shall take off or land an aircraft or enter the traffic pattern of an airport within a control zone.

(2) Control area. When the flight visibility is less than 3 miles, no person shall operate an aircraft VFR in flight within a control area.

(3) Transition area. When the flight visibility is less than three miles, no person shall operate an aircraft VFR within a transition area.

(4) Continental control area. When the flight visibility is less than 5 miles, no person shall operate an aircraft VFR in flight within the continental control area."

14. CFR 71.9.

"Continental Control Area. The Continental Control Area consists of the airspace of the continental United States at and above 14,500 feet MSL but excludes: (1) The State of Alaska, (2) the airspace less than 1,500 feet above terrain, and (3) prohibited and restricted areas except those restricted areas specified in Part 601 of this title.

Control area. Unless otherwise provided in appropriate cases, control areas extend upward from 700 feet above the surface until designated from 1,200 feet above the surface or from at least 500 feet below the MEA, whichever is higher, to the base of the continental control area.

Control zone. Control zones extend upward from the surface. A control zone may include one or more airports and is normally a circular area of 5 statute miles in radius with extensions where necessary to include instrument approach and departure paths."

SUMMARY OF ARGUMENT

The insured, appellee's husband, purchased a policy of insurance drafted and sold by appellant which appeared to provide coverage for "any portion" of his trip between Tachikawa Air Force Base, Japan, and Washington, D.C. Notwithstanding certain technically phrased provisos which purported to limit coverage, the insured was entitled,

under the circumstances, to assume that he was covered on a flight which was an integral part of his entire trip.

In addition, the insured's flight came within the literal language of a proviso in the policy which provided coverage for a "regular, special or chartered flight * * * by, or contracted for by, the Military Air Transport Service (MATS) of the United States." The flight upon which the insured met his death was flown by Travis Transportation Company (hereinafter sometimes called "the Company") pursuant to the provisions of a document signed by a MATS officer and by the Company and entered into at the request of and for the benefit of MATS. This document evidenced a relationship of mutual rights and obligations between MATS and the Company and contained all the essential elements of a contract. Thus, even a lawyer with ample time and means to study this document would have concluded that he was covered on the flight in question. *A fortiori*, the insured, who had neither the time nor the legal acumen to interpret the document, would have so believed, and it is the understanding of the average man, rather than a searching technical analysis, which governs construction of insurance policies.

The trial court correctly declined to apply Japanese law to the interpretation of an insurance policy naming an American citizen and resident as the beneficiary purchased from an American company by an American citizen, en route to his home in the United States who was in transit through a United States Air Force Base located in Japan at the time he purchased the policy.

The trial court properly awarded interest from the date of the appellant insurance company's refusal to pay to appellee the amount due upon the policy. Such interest is required because the sum due on the policy was a "liquidated debt" within the meaning of 28 D.C. Code 2707. Alternatively, even if the sum due was not a liquidated debt the award of interest was within the trial court's discretion under 28 D.C. Code 2708.

ARGUMENT

I

The Policy of Insurance Here in Issue Covered the Entire Air Trip From Tachikawa Air Force Base, Japan, to Washington, D.C.

The question of whether Mr. Messina's death occurred under circumstances within the coverage of the insurance policy must be decided in the light of certain fundamental and well-established principles. The language used in the policy must be read through the eyes of an average person in the position of the insured rather than those of a lawyer or a specialist versed in highly technical language. *Stinson v. New York Life Insurance Company*, 83 U.S. App. D.C. 115, 167 F.2d 233 (1948); *Brown v. Hearthstone Insurance Company*, 19 A.D. 2d 578, 240 N.Y.S. 2d 239 (1963). Insofar as it is humanly possible, the Court must view the insurance policy as "an ordinary person in the shoes of the insured." *Peerless Insurance Company v. Clough*, 193 A.2d 444, 446 (N.H. 1963). Any ambiguity created by the language of the policy is to be construed against the party who has drafted the language, i.e., the insurance company. *Stroehmann v. Mutual Life Insurance Company*, 300 U.S. 485, 81 L.ed. 732 (1937); *Smith v. Indemnity Insurance Company of North America*, 115 U.S. App. D.C. 295, 298, 318 F.2d 266, 269 (1963). This rule "does not serve as a mere tie-breaker; it rests upon fundamental considerations of policy." *Steven v. Fidelity and Casualty Company of New York*, 27 Cal. Rptr. 172, 377 P.2d 284, 290 (1963).

The appellant insurance company cannot obtain a reversal of the judgment below merely by showing that the construction for which it contends is a reasonable one. *State Department of Public Welfare v. Central Standard Life Insurance Company*, 19 Wis.2d 426, 120 N.W.2d 687 (1963); *Merchants Mutual Casualty Company v. Lambert*, 90 N.H. 507, 11 A.2d 361 (1940). The burden is upon the insurance company

"to establish that the words and expressions used not only are susceptible of the construction sought by defendant but that it is the only construction which may fairly be placed upon them." *Lachs v. Fidelity and Casualty Company of New York*, 306 N.Y. 357, 118 N.E.2d 555 (1954).

These are now such well-established principles that we need not labor to document them further. However, they have special meaning in the case at bar because appellant's argument delineates and relies so precisely upon the "literal" language of the policy and a hair-splitting analysis of the words and sentences used.

In the case at bar, the insured purchased the policy at Tachikawa Air Force Base, Japan, and mailed the policy to the beneficiary prior to his departure from Tachikawa (J.A. 34, 74-75, 89). The Company provided no duplicate and thus the insured did not have the policy to read on his journey across the Pacific, nor to consult when he arrived at Travis Air Force Base and secured his transportation via Travis Transportation Company, Inc. to San Francisco International Airport (J.A. 34, 42). This circumstance was considered significant by the California Supreme Court in *Steven v. Fidelity and Casualty Company*, 27 Cal.Rptr. 172, 377 P.2d 284, 294 (1963), in which the Court concluded that a chartered air taxi flight came within the coverage of the policy. Appellant argues that the case at bar is distinguishable from *Steven* in that there was no mailing recommendation on the policy and no evidence that the insured had been "induced" to mail the policy to his wife, the beneficiary (Br. 36). While it is true that there is no evidence that the insured was expressly urged to mail the policy, it is clear that the policy was physically designed to be mailed without an envelope, and it is equally obvious that common sense dictated that the policy should be mailed prior to the insured's departure. The policy would become operative only if and when the aircraft upon which the insured was riding crashed, in which event the policy, if carried

by the insured, would in all probability be lost or destroyed, particularly on a long trans-oceanic flight. In view of the provision requiring notice within 20 days (J.A. 88) such loss or destruction would almost certainly nullify the policy. Appellant also attempts to distinguish the *Steven* case upon the ground that, in that case, "an emergency compelled the insured to use the non-scheduled air taxi." (Br. 36). An examination of the *Steven* case, however, shows that the so-called "emergency" was simply the insured's desire to make a connection with a plane from Chicago to his home in Los Angeles where "an essential work project" was pending. 377 Pac.2d at 287. In the case at bar, the uncontroverted evidence indicates that Mr. Messina took the fatal air taxi flight in order to make a connection with a United Airlines flight departing from San Francisco International Airport at 10:30 P.M. on January 25th. (J.A. 59) The insured's desire, in *Steven*, to make his flight connection in Chicago thus constitutes no greater "emergency" than existed in the case at bar.

The policy which the insured had in his possession for a brief time designated in its "Schedule" Tachikawa Air Force Base as the "point of departure" and Washington, D.C. as the "destination." Following the "Schedule" the policy, in its insuring clause, provided coverage for accidental death or bodily injury,

"received during any portion of the first one way or round trip which is made by the insured while this policy is in force, between the point of departure and destination designated in the schedule and for which the insured has purchased a ticket or has been issued a pass; * * *."

Courts have recognized that in the mind of the average person similar language appears to provide insurance coverage for the entire trip notwithstanding the existence of technically phrased provisos such as the ones contained in the policy here in issue which purport to take away from the insured what the opening lines of the insuring

clause seem to give him. *Steven v. Fidelity and Casualty Company of New York*, 27 Cal.Rptr. 172, 377 P.2d 284, 294 (1962); *Lachs v. Fidelity and Casualty Company of New York*, 306 N.Y. 357, 118 N.E.2d 555 (1954). Such provisos have been ignored by courts upon the ground that they are framed in highly complex terms and are dependent upon the existence of facts which the average traveller has neither the skill nor the time to ascertain or to interpret. In *Lachs, supra*, the court pointed out that the traveller is not expected to carry around with him the Civil Aeronautics Act and the Code of Federal Regulations in order to determine whether a particular flight is within the coverage of his policy. 118 N.E.2d at 558. Similarly, the insured here could not conceivably have gathered all the background facts which are before this Court. Under these circumstances, the insured was justified in assuming, when he reached Travis Air Force Base and was no longer in possession of the policy, that the policy covered his entire trip from Tachikawa Air Force Base to Washington, D. C.

Appellant argues that the insured "deliberately chose" a narrower policy when a "broader form of coverage" was allegedly available. (Br. 12). There is no evidence whatever in the record, beyond the assertion of counsel for appellant at the trial (J.A. 85) that any form of insurance, other than the one Messina actually purchased, was available to the insured. The argument based upon this spurious "fact" is entirely improper. As a matter of fact, we may assume that failure of appellant to introduce any evidence on this point, which was a matter peculiarly within appellant's knowledge, was because it would have been unfavorable to the appellant. *Washington Gas Light Company v. Biancaniello*, 87 U.S. App. D.C. 164, 167, 183 F.2d 982, 986 (1950); *Slenderella Systems, Inc. v. Greber*, 163 A.2d 462, 464 (Mun.App. D.C. 1960). Thus, so far as this record shows, no other form of coverage was made available by the appellant to the insured and the policy here in issue was offered on a "take it or leave it" basis. This

circumstance would tend further to confirm in the mind of the insured that he was covered for the entire trip set forth in the Schedule, from Tachikawa Air Force Base, Japan, to Washington, D.C.

Appellant argues that the District Court erred in finding ambiguity in the insurance policy. (Br. 27-33) To demonstrate the clear and unambiguous nature of the policy, appellant begins his argument by pointing to the light green print superimposed on the face of the policy as follows:

"Read Carefully This Policy is Limited to
Aircraft Accidents on Scheduled Airlines."

Manifestly, there is a conflict between this green print and the printing at the top of the policy which provides for coverage on "scheduled airlines and other specified conveyances." This confusion is increased when one reaches the provisos of the policy and reads that there is coverage for non-scheduled air trips in subparagraphs (1), (d), (e) and (f).

Appellant attempts to reconcile this apparent conflict between the green print and the remainder of the policy by inserting in the green print the word "commercial" and stating that the enumeration of aircraft specified in provisos 1(d) through 1(f), "did not include unscheduled commercial airlines' aircraft." (Br. 29). The word "commercial," however, does not appear in the green print or indeed anywhere else in the policy. That appellant found it necessary to import this word into the policy is but another demonstration of the confusing and ambiguous nature of the language therein.

II

The Insured's Fatal Flight Was Within the Express Language of the Provisos in the Insurance Policy

Even if one makes the highly unrealistic assumptions that the insured (a) understood all of the technically drawn provisos in the insurance policy, (b) remembered the wording thereof after he had mailed the policy, and had flown from Japan to Travis Air Force Base, and (c) conducted an investigation into the operations of Travis Transportation Company, Inc., sufficient to elicit all the information contained in this record, it must still be concluded that Mr. Messina's fatal flight came within the express language of the policy which provides for coverage

"while riding as a passenger in, boarding or alighting from, or being struck by an aircraft operated on a regular, special or chartered flight * * * (d) by, or contracted for by, the Military Air Transport Service (MATS) of the United States. * * *"

The flight upon which Mr. Messina met his death was operated by the Travis Transportation Company, Inc., pursuant to a document denominated a "revocable permit." (J.A. 97-104). It is significant that this document is a two-party instrument signed by the commanding officer of the air base and by the president of Travis Transportation Company, Inc. Thus, it bears all of the external form of a contract. If it were a mere license or permit, as asserted by appellant, there would be no necessity for the signature of the licensee. Moreover, in "Change Number One" by which the name of Travis Air Taxi Service was amended to read Travis Transportation Company, Inc., the latter corporation stated that it was "bound by all of the provisions" of the so-called revocable permit (emphasis added). (J.A. 102)

Further analysis of the document itself, again making the almost unbelievable assumption that the insured had the time and the means to locate the document and the skill to make such analysis, serves further to strengthen the conclusion that this document is a contract between the Military Air Transport Service and Travis Transportation Company, Inc. The document is signed by Colonel Charles W. Stark who, at the date of this instrument, was the Commanding Officer of the Fifth Air Base Group. (J.A. 110) The evidence is uncontroverted that Fifth Air Base Group was a MATS organization (J.A. 67), and that Colonel Charles W. Stark was a MATS officer. (J.A. 70) In the face of this evidence, appellant's suggestion that if the document had been signed at some other time or by some other officer it might not have been a MATS contract (Br. 14) is completely irrelevant. We are not concerned with what Colonel Stark's status might have been but what in fact it was on the date when the document was signed by him and the evidence on that point is, as noted above, uncontradicted.

This document demonstrates a relationship of mutual rights and obligations between the parties thereto which is the very essence of a contract. The relationship was entered into at the request of MATS (J.A. 97-101) and, as even appellant concedes (Br. 22) conferred a benefit upon MATS in that it facilitated the transportation of personnel, one of the primary missions of MATS (J.A. 74). The agreement between MATS and Travis Transportation Company was executed in order to expedite the travel of such persons as the insured, who was travelling under orders and in a duty status. (J.A. 90-92) The likelihood that Messina would be reimbursed for the expenses of such travel (J.A. 34, 118-124) though not critical, further demonstrates that the relationship between MATS and Travis Transportation Company was one of mutual benefit, not a mere concession of license by MATS.

Under the terms set forth in the document, the Military Air Transport Service was obliged to allow Travis Transportation Company, Inc., to use the runway parking facilities and to solicit customers for its air taxi service in the terminal at Travis Air Force Base. In return, Travis Transportation Company was obliged, among other things, to allocate a specified seating priority to prospective passengers, to charge no more than a designated maximum fare for its flights, to take off within two hours after securing its first passenger, to permit personnel of Travis Air Force Base to ride on its flights for the purposes of observing its operating procedure, and to follow a detailed set of safety regulations.

The safety obligations imposed upon Travis Transportation Company, Inc., are particularly important because the obvious purpose of the provisos in the insurance policy is the limitation of coverage to flights which meet certain minimum safety standards beyond which the insurance company is apparently unwilling, in such a policy, to extend its coverage. It is therefore significant that at least two of the standards set forth in Supplement Number One to the document, i.e., the minimum ceiling of 1500 feet and minimum forward flight visibility of 5 miles at cruising altitude (J.A. 103) are more stringent than those prescribed by the Federal Aviation Administration in effect at the time of the execution of this document and of the insured's fatal flight.

These regulations, first promulgated in 23 Fed. Reg. 6178 to take effect on September 11, 1958, are set forth as 14 CFR 60.30(a) and (b) in the Joint Appendix (J.A. 125-126), and are now codified as 14 CFR 91.105 (a) and (b). They provide that an aircraft may be operated with a 1000 foot ceiling and 3 miles of forward flight visibility except in a "continental control area" which is defined by 14 CFR 71.9 as that area 14,500 feet or more above sea level. Moreover, the agreement provided that passengers could be carried only

on multi-engine aircraft. There is no evidence that any of the regulations with which scheduled air lines, or MATS planes, must comply are stricter. Therefore, the record is wholly silent to establish that appellant's risks would be substantially greater than those it admittedly intended to assume.

Appellant contends that the document in question lacks the mutuality requisite to a contract and states that the controlling case on this point is *Alameda County, California v. United States*, 124 F.2d 611 (9th Cir. 1941) (Br. 20-22). The document in question in that case was a license granted by the Secretary of War of the United States to Alameda County permitting it to assume control of three bridges constructed by the Corps of Engineers. As appellant correctly states, the basis of the holding in this case was that "the license specified by its terms that the Secretary of War could terminate the license at will." (Br. 21). The Circuit Court of Appeals for the Ninth Circuit, quoting from the earlier related case of *Alameda County v. Ross*, 32 Cal. App.2d 135, 145, 89 P.2d 460, 464, stated:

"Mutuality of obligations is an essential element in every binding contract. In the present case there is an absolute absence of mutuality for the reason that the Government may cancel the agreement and deprive the County of Alameda of the use or control of the bridges at any moment without cause." 124 F.2d at 617 (emphasis added)

By contrast, the agreement here in question could not be cancelled "at any moment without cause" by either party and so to construe it would render completely meaningless the detailed termination provisions set forth in paragraph II of the Agreement. (J.A. 97-98). This paragraph provided for termination by mutual agreement, unilateral termination at will on thirty days' written notice, and termination by the Commander of Travis Air Force Base because of non-

compliance by Travis Transportation Company, Inc., with the conditions set forth in the document or if the Commander determined that an emergency condition existed or that operational necessity made continuation unfeasible.

The provision for termination on thirty days' notice does not nullify the contract; on the contrary, it establishes that the instrument is more than a mere license because the minimum term is, therefore, the thirty-day term. *Phalanx Air Freight v. National Skyway Freight Corporation*, 225 P.2d 654, modified on unrelated grounds, 104 Cal. App.2d 771, 232 P.2d 510 (1951); *David Roth's Sons, Inc. v. Wright & Taylor, Inc.*, 343 S.W.2d 389 (Ky. 1961). Similarly, the right of the Base Commander to terminate if he in his discretion found certain conditions to exist does not render the contract void. The word "discretion" requires that the Base Commander reach a good faith and reasoned judgment with respect to safety or operational necessity before terminating the agreement under this clause. *Cowden v. Broderick & Calvert*, 114 S.W.2d 1166 (Tex. 1938); *Funk v. Commissioner of Internal Revenue*, 185 F.2d 127 (3d Cir. 1950); *Verrs v. Atlas Assurance Company*, 253 N.W. 584 (Wis. 1934).

Appellant has further argued that the document signed for and on behalf of the United States by Colonel Stark and by Travis Transportation Company was not a contract because Colonel Stark did not have the authority to execute a contract (Br. 16-18). This assertion is based primarily upon the deposition of Lt. Gen. Joe W. Kelley, who stated, in response to a written interrogatory propounded by appellant,* that

* Appellant states that the deposition was "introduced into evidence by appellee herself" (Br. 17). This is a misleading assertion; the answers upon which appellant relies were elicited by written interrogatories propounded by appellant (J.A. 13-14, 63-66) but were read into evidence by appellee's counsel as a convenience to the Court. Appellee's counsel noted his objections to the answers in which Lt. Gen. Kelley purported to render a legal opinion as to whether the document signed by Col. Stark was a contract.

" * * * Col. Stark was not authorized to bind the Military Air Transport Service (MATs) in contract for any such flights and he did not enter into any such contracts so far as this Command is aware." (J.A. 64) (emphasis added)

It is clear from a reading of Lt. Gen. Kelley's deposition that he did not consider the document signed by Col. Stark and Travis Transportation Company, Inc., to be a contract. There is no evidence, from Lt. Gen. Kelley or elsewhere, that Col. Stark lacked the authority to sign the document in question. Whether or not this instrument constituted a contract is a legal conclusion which Lt. Gen. Kelley, not having been qualified as an expert, was incompetent to answer. There is no suggestion that Col. Stark lacked the authority to sign the particular document in question and whether or not such document constitutes a contract is, of course, one of the central issues in this case.

Even if appellant had proved that Col. Stark lacked the authority to sign the document in question on behalf of the Military Air Transport Service of the United States, appellant has no standing to raise such alleged lack of authority. As was stated by Mr. Justice Jackson, dissenting in *Federal Crop Insurance Corporation v. Merrill*, 332 U.S. 380, 387-388, 68 S.Ct. 1, 92 L. ed 10, 17 (1947), the defense of lack of actual authority in one purporting to bind the Government is a "one-way street" and only the Government may raise this point. Even a party having, or contemplating having, direct contractual relations with the United States may not raise the issue of the Government agent's lack of authority. *Perkins v. Lukens Steel Company*, 310 U.S. 113, 127-129, 84 L.ed. 1108, 1114-1116 (1940); *Hartford Accident and Indemnity Company v. United States*, 130 Ct.Cls. 490, 493 (1955). *A fortiori*, appellant, a complete stranger to the contract between MATS and the Travis Transportation Company, has no such standing.

To summarize, the relationship between the Military Air Transport Service and Travis Transportation Company was one which conferred benefits and imposed binding obligations on both sides and which was not terminable at will by either side. If Mr. Messina had had the time and the skill to study and interpret all of the relevant documents and factual information, he would have undoubtedly reached the conclusion that he was covered on his fatal flight. In such case he would have been justified in reaching a conclusion, however argumentative the insurance company might be about it, that the Travis flight was one "by, or contracted for by," MATS.

III

The District Court Correctly Applied American Rather Than Japanese Law to the Interpretation of the Insurance Policy

The insurance policy here in issue was purchased by an American citizen en route to the United States from an American company on a United States air force base in Japan, and names an American citizen as beneficiary. The appellant argues that under the conflicts of laws rule applicable in the District of Columbia, such a contract must be interpreted in the light of Japanese law. (Br. 23-26). Appellant did not even attempt to introduce any evidence with respect to Japanese law nor does it even now argue that the result in this case would be any different under such law. Appellant's failure to aid or inform the Court with respect to Japanese law should, in itself, defeat its argument on this issue.

Appellee does not here ask this Court, nor did she ask the Court below, to reverse the general rule that the law of the place where the policy was issued and the premium paid normally governs the construction of an insurance policy. *Boseman v. Connecticut General Life Insurance Company*, 301 U.S. 196, 87 L.ed. 1036 (1937). Rather,

appellee contends that in the circumstances of this case, where the insured was an American citizen temporarily in transit through an American Air Force Base in Japan, where both the insurance company and the beneficiary are also American and where the policy became final on an American Air Force Base, the application of American law is clearly proper. The circumstance that the policy was entered into on an American military reservation which was located within a foreign country is purely fortuitous. *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954). In *Uravic v. Jarka Co.*, 282 U.S. 234, 75 L.ed. 312 (1931), an American stevedore was injured on board a German ship in New York Harbor. Although the tort was committed on what was technically German territory, Mr. Justice Holmes, writing for a unanimous court, applied an American statute, stating that "it would be extraordinary to apply German law to Americans momentarily on board of a private German ship in New York." 282 U.S. at 240, 75 L. ed at 315.

The case of *Walton v. Arabian American Oil Company*, 233 F.2d 541 (2d Cir. 1956) *cert. den.* 352 U.S. 842, 77 S.Ct. 64, 1 L.ed 58, cited by appellant (Br. 26) is not in point. That case involved a tort committed in Saudi Arabia, not on a U. S. Military base. Moreover, the trial court in that case ruled at the beginning of the proceedings that Saudi Arabian law would control and the plaintiff was given an opportunity to request a continuance in order to assemble the proof of such law. The plaintiff unequivocally stated that he did not wish to prove foreign law and that he chose to rely upon the law of the forum, i.e., New York. 233 F.2d at 545-546. Finally, it should be noted that even Judge Frank, who wrote the opinion for the Court of Appeals in *Walton*, stated that the result "seems unjust." 233 F.2d at 545. None of the factors which compelled Judge Frank to reach the "unjust" conclusion in *Walton* are present in the case at bar.

Having decided to apply American law, the trial court assumed that it need not decide which American jurisdiction governed the interpretation of the insurance policy in the absence of any contention by either party that there was a difference between the laws of any of the United States on this subject. (J.A. 32) Appellant claims that "the burden of showing similarity or dissimilarity of state laws rested upon appellee." (Br. 25). This contention is in error; the law in the District of Columbia is clear that in the absence of some showing to the contrary, the common law of any other state in the United States is presumed to be the same as that in the law of the forum. *Boland v. Love*, 95 U.S. App. D.C. 337, 341, 222 F.2d 27, 32 (1955). Appellant has made no attempt to rebut this presumption and therefore it can be assumed that there is no significant difference among any of the jurisdictions of the United States with respect to the common law and the general principles governing the interpretation of an insurance policy such as the one here in issue.

IV

The Trial Court Properly Allowed Interest to Appellee From the Date of Appellant's Refusal To Pay the Amount Due on the Policy

If the judgment of the trial court is affirmed, appellee is entitled to interest at the rate of six percent per annum from March 16, 1960, the date upon which appellant notified appellee of its refusal to pay the sum due on the policy (J.A. 117). Such interest is required by Title 28, Section 2707 of the District of Columbia Code (1961 Edition), which provides that a judgment for a "liquidated debt" shall include interest. The law is well-established in the District of Columbia that sums due under a policy of insurance are "liquidated debts" within the meaning of this statute. *London & Lancashire Indemnity Company v. Smoot*, 287 Fed. 952, 52 App. D.C. 378, 382 (1923); *Royal Indemnity*

Co. v. Woodbury Granite Co., 101 F.2d 689, 694, 69 App. D.C. 364, 369 (1938).

Even if Section 28-2707 was not applicable, Section 28-2708 of the District of Columbia Code (1961 Edition) provides that the trial court may award interest "if necessary fully to compensate the plaintiff." The District Court here stated that it would make such an award if Section 28-2707 did not apply (J.A. 39). As appellant notes, citing *Flanagan v. Charles H. Tompkins Co.*, 86 U.S. App. D.C. 307, 182 F.2d 92 (1950), (Br. 47), the award of interest is a matter within the broad discretion of the trial court. Appellant does not even argue that the District Court abused its discretion and nothing in this record would support such an assertion.

CONCLUSION

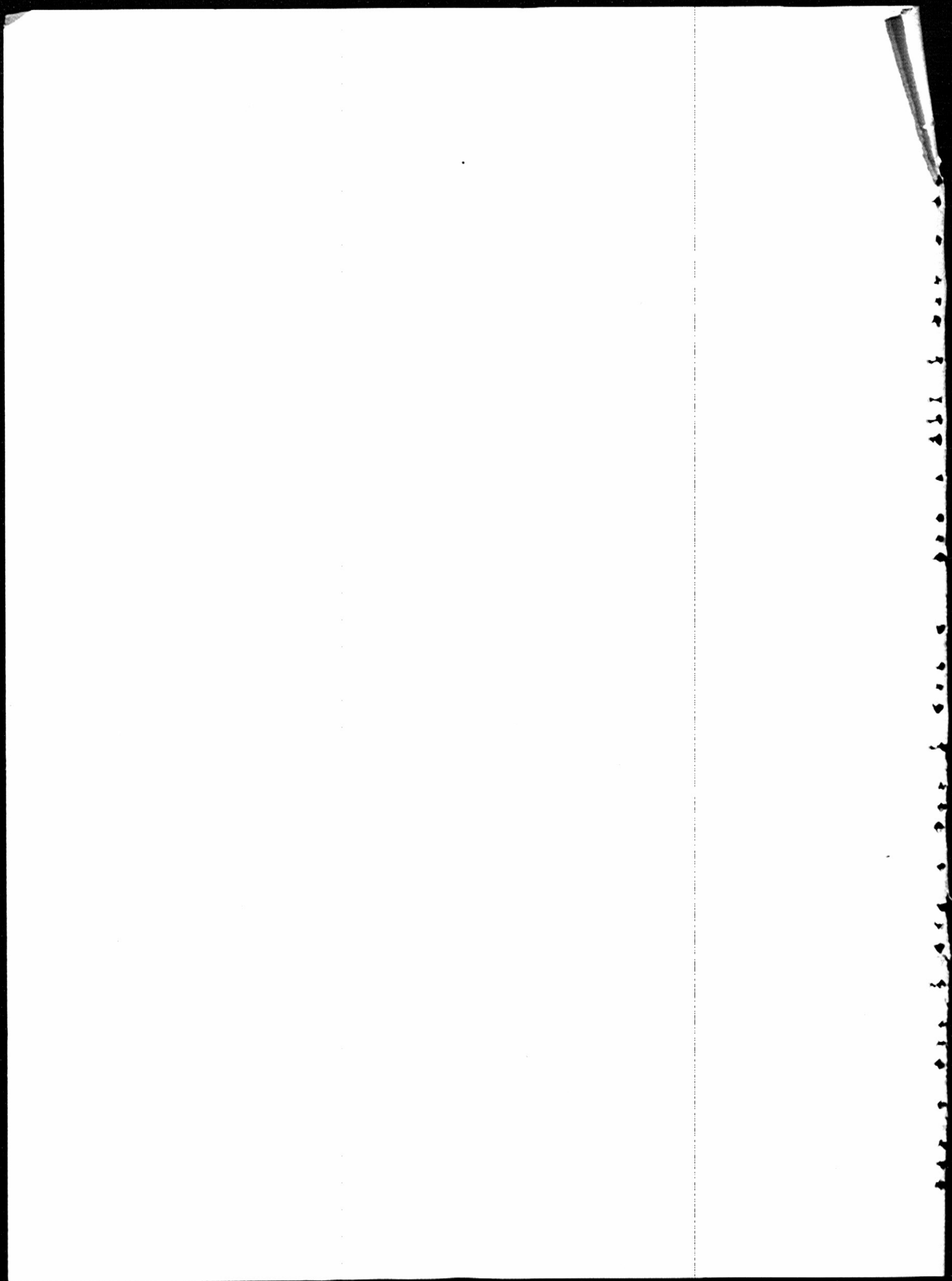
Appellee is content to rely primarily upon the Memorandum Opinion of the District Court (J.A. 28-39, 41-43) and intends this brief to refute certain points raised by appellant's brief. For the reasons set forth in the Memorandum Opinion, as supplemented by this brief, appellee submits that the judgment of the District Court should be affirmed.

Respectfully submitted,

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APPELLANT'S REPLY BRIEF

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,815

MUTUAL BENEFIT HEALTH AND
ACCIDENT ASSOCIATION,

Appellant,

v.

MRS. JOSEPHINE L. MESSINA,

Appellee.

*Appeal From The United States District Court
For The District of Columbia*

United States Court of Appeals
for the District of Columbia Circuit

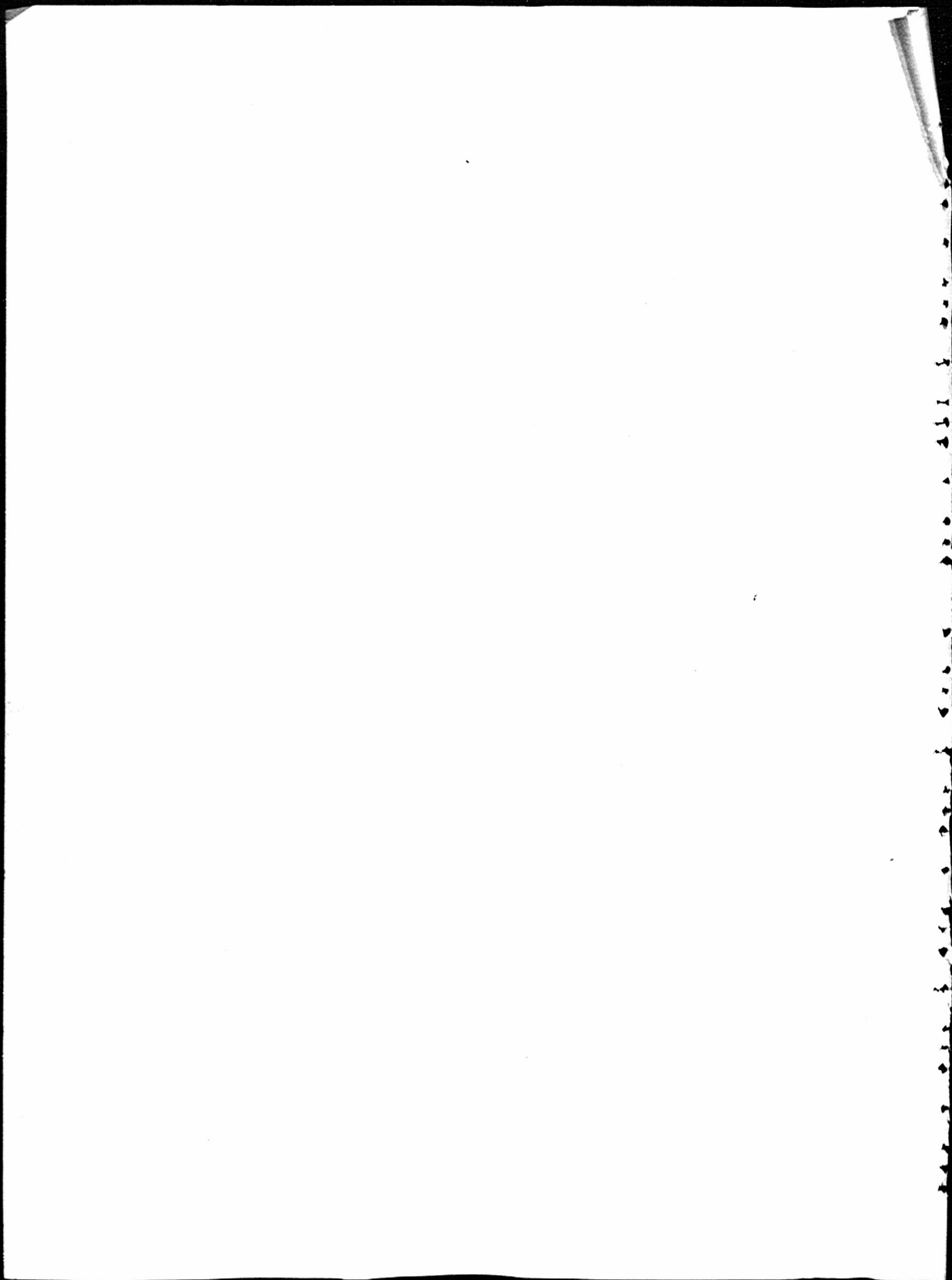
FILED NOV 6 1964

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,815

MUTUAL BENEFIT HEALTH AND
ACCIDENT ASSOCIATION,

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*Appeal From The United States District Court
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APPELLANT'S REPLY BRIEF

Not deliberately attempting to use all fifty pages allowed it by the rule, but in order to deal adequately with the many errors committed by the District Court in finding for the appellee, the appellant trusts that its brief has demonstrated more than ample justification for the reversal of the judgment entered below. The appellant will now be content to merely observe the basic errors of the appellee's first two arguments, and to note how in their brief the authors have begged the sole question on which issue was joined.

That question was simply whether the fatal air taxi flight on which the insured lost his life was the type of flight, i.e., a flight "contracted for by" MATS, covered by the insurance policy on which his beneficiary has sued.

I. The Policy Coverage.

Counsel for the appellee assert that the insurance policy sued on "appeared" to provide coverage for "any portion" of the insured's trip between Japan and Washington, but they conveniently ignore the qualifying language immediately following the part of the insuring clause which limited his coverage to any portion for which he has purchased a ticket and to the six types of flights enumerated in the same paragraph.

Without showing any relevancy to the generalities asserted about policy language, appellee's counsel in this argument cite various cases. Reference is made to "ambiguity" without describing a single example of one in the policy sued on. Instead of even attempting to support the findings of the District Court regarding ambiguities which find no basis in the record (the complaint and the pre-trial order being completely silent on the subject), they decline "to document them further" and snidely refer to the appellant's delineation of the "literal" language of the policy.

The appellant concedes that if the policy contained a clear ambiguity which obviously misled the purchaser as to the extent of its coverage, rules of construction should be resorted to in order to fairly interpret the language. As it stated in its brief however, there is no ambiguity here and the clear and definite provisions upon which the company's calculations were based should be maintained unimpaired by loose and ill-considered interpretations.

The appellant trusts its delineation will be found more helpful than the appellee's avoidance of her burden to uphold this question injected solely by the District Court in its findings.

The persuasiveness of appellee's argument loses much of its effect when many unsupported assertions contained therein are spiked. One of them is that the defendant provided no duplicate of the policy to the purchaser. This is not only a pure assumption, but infers that he bought the policy from the agent without ascertaining the extent of the protection of its terms. The more reasonable assumption, of course, is just the opposite, viz., that he did obtain a duplicate or at least that one was available to him if he was interested. Moreover, the legal presumption is that he read it and understood its terms. Appellee's counsel admit in their brief that it was "in a form more or less familiar to travelers". (Br. 2)

Appellee's counsel unsuccessfully attempt to argue that it was the burden of the appellant to show that a broader form of coverage which for a higher premium, commensurate with the greater risk, was available to the purchaser. This is just as false as their characterization of appellant's reference thereto as one within the peculiar knowledge of the appellant. Not only is it common knowledge that insurance companies promote the sale of the broadest forms of coverage possible, but such testimony -- or a denial thereof if appellee's counsel deemed it possible -- was just as available to them, by subpoena if necessary.

They close their Argument I by accusing the appellant of being confused, asserting that it inserted in the green print (the warning "Read Carefully This Policy Is Limited to Aircraft Accidents in Scheduled Airlines") the word "commercial." The visible proof that it is they who are confused is to be seen by merely looking at the face of the policy (J.A. 86). If the word appears in their copy of the joint appendix, the identity of the culprit who made the alteration is a mystery to appellant. It does not appear in its.

The only use of the word "commercial" by the appellant in its brief was to refute the District Court's gratuitous finding of an ambiguity in the insuring clause, compared with the large boldface print at the head-

ing of the policy, both quoted on pages 28 - 29. On page 29 the appellant, after admitting that its policy included coverage on MATS, RCAF and certain USAF aircraft in addition to scheduled interstate airlines, scheduled intrastate airlines, and scheduled foreign airlines, emphasized that "the enumeration of these conveyances did not include unscheduled commercial airlines' aircraft".

From that assumption appellee's counsel spring into the argument that this circumstance was considered significant in *Steven v. Fidelity and Casualty Company*, 27 Cal. Rptr. 172, 377 P2d 284, in finding for the plaintiff in a case involving a substitute connecting flight made in an air taxi after an integral part of the passenger's itinerary on scheduled airlines was cancelled due to bad weather. What they do not advise this Court however is that the California Court admitted that it was "an unusual case" because it involved a machine-vended policy which "hardly afforded the purchaser a chance to read the policy" before he bought it, nor was it dealing "with the orthodox insurance policy sold in the protective aura of the insurer's explanation and discussion of its terms."

Other distinguishing circumstances entered into that case too, as were pointed out in the appellant's brief at pages 35 - 37 which need not be repeated here.

Without distinguishing between exclusions inserted in the latter part of a policy vis-à-vis provisos contained in the same insuring clause which describe the coverage, and without quoting any supporting court decision, appellee's counsel urge that the agreed terms of the instant policy be ignored and "what the mind of an average person" would assume respecting its coverage be adopted.

In the absence of any clear ambiguity this argument is not only without any authoritative support but obviously lacks the slightest merit. Vendors cannot be expected to determine in advance the intelligence level of their prospective buyers. A clearly described agreement must

be as binding on a fifth grader as an Einstein. Legal liability under a contract is not in proportion to one's understanding. If it were it would place a premium on carelessness in reading a contract before signing it.

II. The Express Language of the Policy.

Without citing any authority in support, appellee's counsel contend that the mere signature of the licensee air taxi carrier in the document designated by it and the Commander of the United States Air Force's Travis Air Force Base as a "Revocable Permit" transforms it into a contract. They contend that they fail to see the relevancy of an analogy observed by the appellant in its brief when it asserted that it seems fair to say that if the permit had been issued at a time, not very long before, when SAC rather than MATS was assigned the housekeeping chores at the base it would be equally invalid to say that the permit constituted a contract of SAC.

Whether they are able to see it or not, the fact remains that the rights and obligations of the USAF and the Air Taxi Company derived under the permit issued by the USAF cannot ipso facto make it a contract, nor have they even hinted at how either of the parties to the permit could enforce one against the other.

The testimony of the head of MATS, adduced by the appellee's counsel themselves, that the Base Commander at Travis had no authority to contract for air taxi flights is not irrelevant or incompetent at all. They have shown no such authority, as would be their burden, and if such had been conferred upon the Base Commander it would have had to come from MATS, and General Kelley was the very top head of MATS.

The appellant has proved that there is no such thing as an implied or apparent authority of a Government agent. After creating the collateral issue of this Revocable Permit constituting a contract which

allegedly made the fatal flight one contracted for by MATS, appellee's counsel attempt to assert that the appellant -- who was not a party to it at all -- is estopped to raise the question of the USAF signatory's lack of authority to bind MATS.

The instant case does not involve an appellant who was dealing with the Government or one even contemplating contractual relations with the Government. The conclusion of appellee's counsel that it therefore follows that a complete stranger to the alleged contract between MATS and the Air Taxi Company has no standing to question the validity of such an alleged contract is false. But all this is academic when it is realized that, even if this permit could be construed as a contract, it would not make the fatal flight herein one contracted for by MATS; that flight was contracted for, i.e., purchased not by MATS but by the insured himself.

III. The Applicable Law.

The appellant has dealt with this interesting and pertinent subject at length in its brief. Its contention that the appellee has not sustained the burden of proving the right to recover under the insurance contract has not been challenged seriously. The inference raised that the situs of the contract was American territory is not supported by any evidence and, if it were true, it would have been a simple matter to obtain such testimony by an officer of either our State Department or the Japanese Embassy.

IV. The Award of Interest.

This question too was argued by appellant in its brief and nothing new has been injected by appellee.

CONCLUSION

Everyone sympathizes with widows, but unless their providers can rely upon the solvency of insurance companies mere sympathy will have to substitute for the proceeds of insurance programs created for them. All forms of insurance policies, life, fire, automobile, and other types of casualty coverages, contain limitations which reflect the exposures which the parties bargained for on the basis of the risks involved and the costs of assuming them. It is for that reason that the law honors the clearly and definitely stated agreements of parties, regardless of what one of them allegedly understood the agreement to mean. No clear ambiguity having been shown to appear in the policy herein, the appellee having failed to establish that the fatal flight in air taxi of an unscheduled commercial airline was one within the coverage bargained for, and the appellant having demonstrated that the findings of the District Court included clear reversible error, the judgment entered for the appellee thereon should therefore be reversed and a mandate for the entry of judgment in favor of the appellant-defendant should issue from this Court.

Respectfully submitted,

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PETITION FOR REHEARING BY PANEL OR IN THE
ALTERNATIVE FOR HEARING EN BANC

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,815

MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION,
Appellant,

v.

MRS. JOSEPHINE L. MESSINA, *Appellee.*

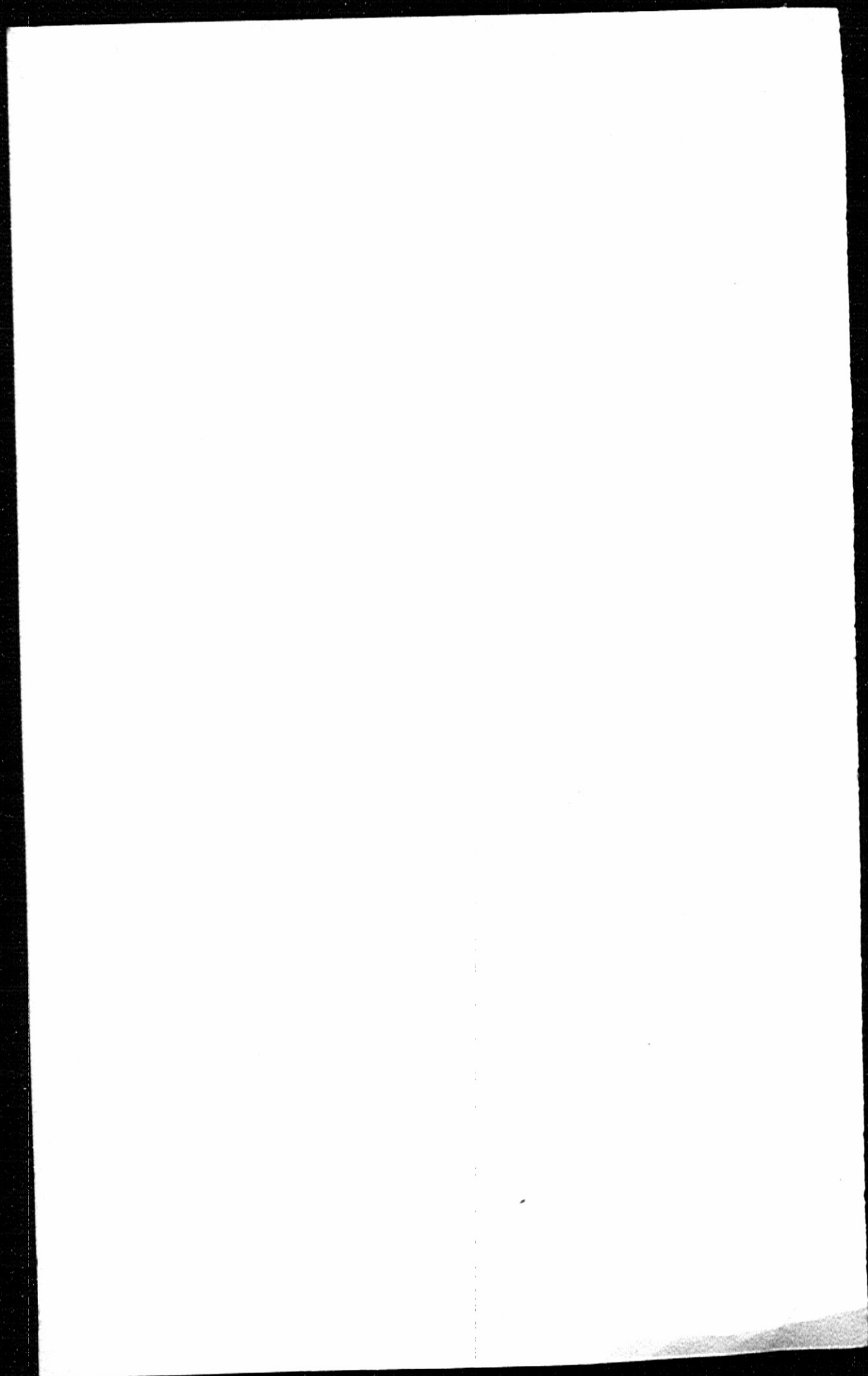
Appeal from the United States Court of Appeals
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United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 2 1965

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IN THE
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No. 18,815

MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION,
Appellant,

v.

MRS. JOSEPHINE L. MESSINA, *Appellee.*

Appeal from the United States Court of Appeals
for the District of Columbia Circuit

**PETITION FOR REHEARING BY PANEL OR IN THE
ALTERNATIVE FOR HEARING EN BANC**

The Appellant, through its attorney, respectfully petitions this Court for a rehearing or, in the alternative, for a hearing en banc, for the following reasons:

1. The majority of the Division did not specifically pass upon the assumption of the District Court that Japanese law contains the same governing principles of the law

of contracts as "American contract law," and that it need not decide which state law governs.

2. The majority of the Division approved, without discussion, the District Court's palpably strained interpretation of a Revocable Permit, issued by an Air Force Base Commander, as a contract making the insured's fatal air taxi flight a covered flight under the appellant's insurance policy with the appellee as one "contracted for by MATS."

3. If this decision is to constitute the law of the District of Columbia, it should be reviewed by the full bench of this Court.

PRELIMINARY STATEMENT

By opinion and judgment rendered June 3, 1965, a panel of this Court, with Circuit Judge Burger dissenting, affirmed the District Court's judgment that the plaintiff was entitled to recover upon an insurance policy. In so doing, the majority of the panel approved without discussion (1) the District Court's overturning of a long-settled District of Columbia rule of conflict of laws applicable to contract cases, and (2) the District Court's application of a general common law of "American Contract," a body of law heretofore entirely unknown to American jurisprudence.

As these rulings—now sanctioned without discussion by a panel of this Court—have vast import to the law of the District of Columbia, and to the inter-relationship of local law between the various States, including the District of Columbia, this case we respectfully submit, falls within that limited category requiring the consideration and a deliberate pronouncement by this Court sitting en banc. As the decision of the panel is, we respectfully submit, one that upon any law is clearly in error, petition is first made for rehearing by the panel which may obviate a necessity for consideration by the full Court. The grounds underlying this petition are as follows:

STATEMENT OF THE CASE

1. This case in short¹ involves a suit upon an insurance policy contract entered into in Japan between plaintiff's husband, Salvatore Messina, and the appellant insurance company, whereby the life of Mr. Messina was insured in the now familiar air travel policy. This policy, as far as is here pertinent, insured Mr. Messina's life, "while a passenger on Scheduled Airlines and Other Specified Conveyances or While on the Premises of an Airport to the Extent Herein Provided." (J.A. 86, bold face type at top of first page of policy.)

Mr. Messina, a civilian government employee, contemplated an air trip from Tachikawa Air Force Base in Japan to Washington, D. C. The issued policy by its express terms covered accidental death on this air trip provided that the death occurred while Mr. Messina was riding as a passenger in an aircraft operated on a regular, special or chartered flight (a) by a scheduled United States airline holding a CAB certificate, (b) by a scheduled United States intrastate passenger airline holding a state certificate, (c) by a scheduled duly licensed foreign airline, (d) by, or contracted for by, the Military Air Transport Service (MATs) of the United States, (e) by the Canadian or British Air Transport Command, or (f) by certain units of the United States Air Force (J.A. 86-87). The policy also applied while Mr. Messina was a passenger in a "surface vehicle provided or arranged for by" a covered "airline" or airport authorities if such surface vehicle was being used for the purpose of beginning, continuing, or completing the air trip. (J.A. 87)

Mr. Messina flew from Japan to Travis Air Force Base, California, on a scheduled commercial air carrier on a flight contracted for by MATs. At Travis he purchased a ticket

¹ A full discussion of the case may be found in the briefs filed in this Court and in the dissenting opinion of Judge Burger. "J.A." references are to the joint appendix filed in this case.

on a scheduled commercial flight from San Francisco International Airport to Washington, D.C. To get from Travis to San Francisco International, Mr. Messina purchased, with \$15 of his own money, a ticket on a non-scheduled air-taxi. The air-taxi plane on which he flew crashed en route to San Francisco International Airport and Mr. Messina's death resulted.

It was stipulated by both parties, and agreed by the District Court (J.A. 31), that the sole issue in the case was whether the air-taxi flight was "contracted for by, the Military Air Transport Service (MATS)"—for it was agreed and found that none of the other specified types of flights applied.

The District Court nevertheless found *sua sponte* that the insurance contract contained ambiguities concerning whether the contract applied to non-scheduled as well as scheduled airlines—a matter which, as noted, was not in issue. The Court "in the light of these considerations" then concluded that a revocable permit issued by the base commander of Travis (an individual then fortuitously assigned to MATS) and permitting the air-taxi to use Travis upon certain conditions constituted a contract by MATS for the carriage of Mr. Messina within the meaning of the insurance contract.

In so holding, the District Court was faced with the argument that, under long-settled law of the District of Columbia, the construction, effect, and application of the insurance contract was to be governed by the law of Japan, the undisputed place of contract. *Smith v. Union Bank of Georgetown*, 30 U.S. (5 Pet.) 518 (sitting in a District of Columbia case); *Croissant v. Empire Realty Co.*, 29 App. D.C. 538. The District Court, however, applied a rule new to the District of Columbia: that the law of the place of the most significant contacts governs in contract cases. This law, the Court ruled, was "American Contract law," and "the Court need not decide which American jurisdiction governs,

since neither party has suggested that the courts of any one state would decide the issues presented herein any differently from the courts of other states."

The District Court then went on to write and apply rulings of "American Contract law" crucial to this case: First, the Court ruled, if a contract is found to contain an ambiguity in any of its provisions, the entire contract is to be construed against the insurance company, despite the fact that the claimed ambiguity goes to a question that the parties stipulate and the court finds is not at issue. And, second, one who buys an insurance contract, particularly an air travel policy, is deemed not to be familiar with the terms of the policy and therefore may take advantage of an implied "impression" that a restriction or limitation written into the policy did not exist. Finally, the Court ruled that a permit to use an Air Force Base constituted a "contract" which in turn amounted to a "contract" for the carriage of Mr. Messina within the meaning of the insurance contract. The Court thereupon found for the plaintiff.

A panel of the Court affirmed without discussion of any of the issues. Judge Burger dissented.

ARGUMENT

I

The District Court Erred in Assuming That Japanese Law Contains the Same Governing Principles of the Law of Contracts as American Contract Law and That It Need Not Decide Which State Law Governs

1. At least since 1831, when the rule was laid down by the Supreme Court sitting as the court of highest jurisdiction for the District of Columbia, it has been the well-settled conflict-of-laws principle of the District of Columbia that the construction, effect, and application of a contract is to be governed by the law of the place of contract. *Smith v. Union Bank, supra*. Whenever the courts in the District of Columbia have had occasion to speak to the question, the

the resolution has been the same. See, e.g., *Croissant v. Empire Realty Co.*, 29 App. D.C. 538; *Bayside-Flushing Gardens v. Beverman*, 36 F. Supp. 706 (D.D.C.). The principle indeed has been so well established and accepted that in recent years no discussion has appeared in the law reports. Rather, as in *Smith v. Indemnity Ins. Co.*, 115 U.S. App. D.C. 295, 318 F. 2d 266, this Court, after finding that the policy was issued in Texas, applied Texas contract law despite the fact that the decedent was on a trip from Washington to Phoenix, Dallas, New Orleans, and Biloxi and was killed in the vicinity of New Orleans. The Court made clear that the case was governed by "the rule in Texas"—the place of contracting. 318 F. 2d at 269.

It is of course true that other jurisdictions have different rules, and from time to time rules have changed in some of the states, but as far as we have been able to ascertain, never without the due deliberation by the court of highest resort of the considerations involved. And these are considerations of much moment. One who contracts does so in view of the law of a particular jurisdiction. Language is drafted and rights and obligations are calculated upon the basis of the substantive law which all have presumed prevails. This is particularly so when rights and obligations are the basis of the calculations of risk and the setting of rates underlying the contract. Thus, we respectfully submit, the conflict of laws principle is too important to be altered silently, without full consideration and discussion by the court charged with setting forth the law of the jurisdiction. For that reason, we respectfully submit that this case is peculiarly appropriate for the *en banc* consideration of this Court.

2. The District Court has suggested that it really makes no difference what substantive contract law is applied, for in the absence of a showing that jurisdictions differ it would presume that all law is identical. But the Supreme Court has ruled otherwise.

Here it is undisputed that the place of contracting is Japan. Thus, under the long-settled rule of the District of Columbia, Japanese law would govern. But appellee has not maintained her burden of proving what that law is. In the absence of such proof, the District Court assumed that Japanese law would be the same as "American Contract law." Here the District Court—and the panel of this Court in affirming—erred.

It is now beyond dispute that, when an action is brought upon the law of a jurisdiction other than that of the forum, "the duty of the court is not to administer its notion of justice but to enforce an obligation that has been created by a different law." *Cuba R. v. Crosby*, 222 U.S. 473, 478, citing *Slater v. Mexican National R.*, 194 U.S. 120, 126. The Supreme Court in the *Crosby* case was concerned with whether an action would lie in a federal court for a tort committed in Cuba in the absence of proof of Cuban law.² In deciding this question, the Court (per Mr. Justice Holmes) laid down the guidelines that control the instant case. After noting that Cuban law was derived from that of Spain, the Court declared: "There is no general presumption that that law is the same as the common law. We properly may say that we all know the fact to be otherwise. *Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co.*, 164 Fed. Rep. 869." 222 U.S. at 479. Though the Court recognized that,

as between two common law countries, the common law of one reasonably may be presumed to be what it is decided to be in the other, in a case tried in the latter state, . . . a statute of one would not be presumed to correspond to a statute in the other, and when we leave common law territory for that where a different system prevails obviously the limits must be narrower still.

² Although much of the law in this area has been made in tort cases, the principle is the same whether the setting is tort or contract: if the conflict of laws rule requires the case to be decided under Japanese substantive law, the plaintiff must prove that law.

Savage v. O'Neil, 44 N.Y. 298. *Crashley v. Press Publishing Co.*, 179 N.Y. 27, 32, 33. *Aslanian v. Dostumian*, 174 Massachusetts, 328, 331.

222 U.S. at 479. In that case, where liability would need be predicated on civil law rather than common law, the Court held that "it could not be assumed without proof that the defendant was subject" to liability. 222 U.S. at 480. See also *Black Diamond S.S. Co. v. Stewart & Sons*, 336 U.S. 386, 396-98.

And this principle is fully applicable to cases in which a contract is governed by the law of a foreign country because it is executed in that country. *Scudder v. Union National Bank*, 91 U.S. 406. The Supreme Court clearly stated it in *Liverpool & G.W. Steam Co. v. Phenix Insurance Co.*, 129 U.S. 397, 445 thus:

The law of Great Britain since the declaration of Independence is the law of a foreign country, and, like any other foreign law is matter of fact, which the courts of this country cannot be presumed to be acquainted with, or to have judicial knowledge of, unless it is pleaded and proved. The rule that the courts of one country cannot take cognizance of the law of another without plea and proof has been constantly maintained, at law and in equity in England and America. (Emphasis supplied)

This court too has recognized that the law of a foreign country is a question of fact to be proven. *Reissner v. Rogers*, 276 F. 2d 506, 512. And the other circuits are in agreement. The Fifth Circuit has agreed: "Neither the District Court nor this Court takes judicial notice of the laws of the Republic of Panama, but such foreign laws must be pleaded and proved as facts." *Liechti v. Roche*, 198 F. 2d 176. See, to the same effect, *Philip v. Macri*, 261 F. 2d 945, 948 (C.A. 9); *Ozani v. United States*, 165 F. 2d 738, 744 (C.A. 2); *Fernandez v. Linea Aeropostal Venezolana*, 156 F. Supp. 94 (S.D. N.Y.); *Harris v. American Int'l. Fuel & Pet. Co.*, 124 F. Supp. 878 (W.D. Pa.). See

also Goodrich, *Conflict of Laws* 232-36 (3d ed. 1949); McCormick, *Evidence* 698; Nussbaum, *The Problem of Proving Foreign Law*, 50 *Yale L.J.* 1018.

In *Walton v. Arabian-American Oil Co.*, 233 F. 2d 541 (C.A. 2), cert. den., 352 U.S. 877, the Second Circuit was faced with determining liability under the law of Saudi Arabia in absence of proof of that law. Judge Frank, speaking for the court, noted that "the general federal rule is that the 'law' of a foreign country is a fact which must be proved." At most, he stated, judicial notice might be taken of English law. But such latitude is not available "where, as here, comprehension of foreign 'law' is to say the least, not easy. . . ." 233 F. 2d at 543.³

The failure of a plaintiff to prove the foreign law upon which his case depends, as the failure to prove any essential element in his cause of action, leaves the court with only one alternative: to enter judgment for the defendant. *Philip v. Macri*, 261 F. 2d 945, 948 (C.A. 9); *Walton v. Arabian-American Oil Co.*, 233 F. 2d 541, 546 (C.A. 2); *Ozani v. United States*, 165 F. 2d 738, 744 (C.A. 2); cf. *Cuba R. v. Crosby*, 222 U.S. 473, 480.

This case is not one that might fall within the oft-stated exception for common-law countries. See *Cuba R. v. Crosby*, 222 U.S. 473, 478; *Siegelman v. Cunard White Star*, 221 F. 2d 189, 196-97 (C.A. 2). Here, as in *Crosby*, "there is no general presumption that" Japanese and Korean "law is the same as the common law. We properly may say that we all know the fact to be otherwise." 222 U.S. at 479. Indeed, here we have not even whatever inference of similarity might arise from the points of cultural heri-

³ The plaintiff in that case relied upon a New York statute allowing a court to take judicial notice of foreign law. This argument was rejected: "[A] court 'abuses' its judicial notice of foreign 'law' when it is not pleaded, and surely does so unless the plaintiff, who would otherwise have had the burden of proving that 'law,' has in some way adequately assisted the court in adequately learning it." 233 F. 2d at 543.

tage that common-law countries have in common with the civil-law nations of Western Europe and Latin America.

In entering a decree for appellee in this case, the court below ignored these guidelines. We have seen that this cause of action, if maintainable at all, must, under heretofore settled District of Columbia conflicts rules, be determined in accordance with the law of Japan—the law of the place of contracting. Yet, though the appellant raised this issue in the court below, appellee has not proven or even alleged the Japanese law upon the basis of which he might recover.

3. The substantive contract law to which the District Court referred was “American Contract law.” But, we respectfully submit, there is no such animal known to American jurisprudence. The closest body of law to that espoused by the Court below is the so-called federal common law of the days of *Swift v. Tyson*, 16 Pet. 1. But the days of *Swift v. Tyson* ended in 1938 with the decision of *Erie R. v. Tompkins*, 304 U.S. 64. There the Court ruled explicitly that “Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . There is no federal general common law.” 304 U.S. at 78.

The only exception written into that rule is one applicable to contracts entered into by the Federal government. See *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67. But that exception is narrow and precise. See *Bank of America v. Parnell*, 352 U.S. 29; see also *United States v. Yazell*, 334 F. 2d 454 (C.A. 5), certiorari granted, 379 U.S. 957.

The body of law to which the District Court below looked for its substantive contract principles was not the law of the District of Columbia, nor that of any of the States, nor of Japan. Nor was it the federal common law of *Swift v. Tyson* or of *Clearfield Trust*. Rather it was a new body of law which the Court termed “American Contract law.”

The Court cited no precedent for the existence of this body of law, and, we respectfully submit, it could not do so, for no precedent exists.

The reference to a general "American Contract law" was emphatically rejected by the Supreme Court in *Erie R. v. Tompkins*. There, quoting in part from Mr. Justice Field's opinion in *Baltimore & O. R. v. Baugh*, 149 U.S. 368, 401, the Court pointed out that "the fallacy" underlying *Swift v. Tyson* was the "assumption that there is 'a transcendental body of law outside of any particular State but obligatory within it. . . .'" "[B]ut" the Court went on: "law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else." 304 U.S. at 79.

Further, the Supreme Court based its rejection of the *Swift v. Tyson* doctrine of "a transcendental body of law outside of any particular State" on the ground that it was—in the words of Mr. Justice Holmes, *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 370-72, quoted in *Erie R.*—"an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."

Now, twenty-seven years after *Erie R. v. Tompkins*, the Court below has resurrected the concept of "a transcendental body of law"—which it terms "American Contract law." And a panel of this Court has affirmed, without discussion.

We respectfully submit that *en banc* consideration of this decision is warranted.

II

The District Court Erred in Holding Immaterial Provisions in the Insurance Policy Sued on To Be Ambiguous and Thereupon Construing a Revocable Permit Issued by an Air Force Base Commander to the Air Taxi Carrier a MATS Contract Making the Insured's Fatal Flight One Contracted for by MATS

The principles of law applied by the Court below as part of this transcendental "American Contract law" are, we respectfully submit, erroneous innovations into any jurisprudence. First of all the Court below found ambiguities in certain provisions of the insurance contract. While we agree with Judge Burger that "if those provisions are ambiguous, there are no unambiguous insurance policies," the innovation of law goes to the fact that whatever ambiguities were found by the District Court related to a matter not at issue. As we have noted, it was agreed and found that the provisions of the contract limiting coverage to carriage on scheduled airlines were not in dispute. The only issue before the Court, it was agreed and found, was whether the air-taxi flight was "contracted for by, the Military Air Transport Service (MATS) of the United States" within the meaning of that provision of the insurance contract. Thus any ambiguities going to special, chartered, scheduled or non-scheduled flights were entirely irrelevant.

The references to such flights, the court held, would have led a reasonable person in Mr. Messina's position to believe that the air-taxi flight was covered—unless some clear warning to the contrary can be discovered in the terms of the policy. The warning appearing diagonally on the face of the policy in large green type limiting aircraft accidents to scheduled airlines was not clear enough. A specific exclusion of air-taxi coverage was held necessary. The appellant's argument that under the doctrine of *expressio unius, exclusio alterius* the coverage which was expressly limited to six specified types of air flights and a clearly described surface vehicle excluded all other risks was to no avail.

We respectfully submit that there is neither precedent nor warrant for holding that an ambiguity on an immaterial provision of a contract should result in a material provision being strictly construed against the insurance company. Yet this was the holding of the Court below, (J.A. 34) affirmed without discussion by a panel of this Court.

Secondly, without the slightest bit of evidence in the record for support, it held that "[T]he [appellant] company provided no duplicate policy." On that erroneous assumption it proceeded to rule, as a part of "American Contract law," that Messina's impression that his policy covered the continuous flight from Japan to Washington, D. C., would have been stronger than ever (J.A. 34), having mailed it to the plaintiff before he departed from Japan. In doing so it rejected the far more reasonable probability that he was familiar with its terms, having purchased it in a personal confrontation with the insurer's authorized agent. Mr. Messina was in no way held to know its contents.

The Court below relied upon one case for its view: *Steven v. Fidelity & Casualty Co.*, 58 Cal. 2d 862, 377 P. 2d 284. But the California Supreme Court noted that *Steven* was an "unusual case," made so by certain factual elements not at all present here. In *Steven* the insurance policy was purchased from a vending machine. Here the policy was purchased from the insurance company's sales agent, where, in the words of the California Supreme Court in *Steven*, "the insurer's explanation and discussion of its terms" could be had. In *Steven* the restrictive language was covered up in the vending machine; here no such situation existed. In *Steven* the non-scheduled air taxi flight was arranged by the scheduled airline on which the insured had booked passage and hence could be considered a part of that booked passage. Here the air taxi flight was contracted for by Mr. Messina on his own; the booking scheduled airline had no knowledge of or part in his action.

Taking *Steven*—which the California court expressly warned should be viewed “in the composite of its special and unique circumstances”—the Court below turned its holding into a general principle of “American Contract law” and applied it where the unique circumstances of *Steven* did not exist. Here, too, we respectfully submit, the District Court erred.

Thirdly, after reiterating that it must interpret the proviso that the air-taxi flight is covered only if it is a flight “contracted for by MATS,” the District Court finally arrived at its basis for concluding that the fatal flight was one “contracted for by” MATS.

Despite the admonition of the United States Supreme Court in *Williams v. Union Central Life*, 291 U.S. 170, at 54 S. Ct. 352, that,

the provisions of insurance policies which are clearly and definitely set forth, and upon which the calculations of the company are based, should be maintained unimpaired by loose and ill-considered interpretations

the District Court “reasoned”:

If the ordinary person in Mr. Messina’s position had inquired whether the flight was or was not “contracted for” by MATS, he would have been shown a document called a “Revocable Permit.”

The tortured nature of this reasoning is recognized when one considers that such an inquiry would naturally have been made of the appellant insurer’s salesperson who was not a party to the permit and who obviously would not have had a copy of it, if even aware of it.

If the inquiry was made of either of the parties to the supposed “contract,” the president of the air taxi carrier, or the commandant of MATS, Messina would have been told (after he had purchased his policy) that they did not regard the permit or license as a contract. (J.A. 52). Moreover, he would have been told by the head of MATS that the base

commander who signed the permit was not authorized to bind MATS in contract for any such flights (J.A. 64).

These answers are provided by evidence put into the record by the appellee herself and stand uncontradicted. Although it is clear that the permit merely authorized the carrier without charge to use a designated portion of the airfield to discharge and take on passengers and conferred upon it no enforceable right, the District Court held that "it has all the essential elements of a contract, at least from the point of view of a reasonable man in Mr. Messina's position had he been shown the document." How all this could have misled him into any impressions he may have had when he bought his policy earlier is left unexplained. No where in it was MATS mentioned.

In all the shifting discussion in the District Court's opinion the sole issue is lost sight of, namely, whether the fatal flight was covered by the insurance policy. By stipulation this issue was narrowed down to the question of whether the particular air-taxi flight between airports was one "contracted for by MATS." In finding that the "revocable permit" was a contract, the appellant respectfully submits, the District Court did not resolve the critical issue, for even if, for the sake of argument, it were conceded that the permit in question was tantamount to a contract, *it was not a contract of purchase for the fatal flight* giving rise to the claim herein; that flight was contracted for by Mr. Messina himself who purchased it for \$15 cash out of his own pocket.

CONCLUSION

The accident insurance policy sued on was purchased in Japan from a sales agent of the appellant insurance association. The purchaser at the time was only ticketed to Travis Air Force Base, California. Instead of buying a broader form of coverage, he chose to buy a policy for \$4 which provided \$50,000 coverage on six expressly described flights.

This policy had stamped diagonally across its first page in its largest type, and in green—a different color—the glaring warning: "READ CAREFULLY: THIS POLICY IS LIMITED: TO AIRCRAFT ACCIDENTS: ON SCHEDULED AIRLINES."

Upon arriving at Travis Air Force Base, instead of taking one of the other modes of surface transportation available to him, this traveler chose, of his own volition and at his own expense, to purchase an air taxi flight on an unscheduled air line which later crashed.

It was stipulated by the parties to the suit brought herein, and agreed by the District Court below, that the sole issue is whether the fatal flight was covered by the insurance policy, viz., whether it was a regular, special or chartered flight contracted for by MATS.

At the close of the plaintiff's case the District Court denied the appellant's motion to dismiss and for judgment, and instead entered a judgment for the appellee. On appeal this judgment was affirmed by a majority of the Division in a thirteen line Per Curiam decision without undertaking any analysis of the issues. Because of the importance of the case and the obvious affect this decision will have on the underwriting and actuarial bases of air travel insurance—so vital to both the traveling public and the industry—a rehearing, *en banc* if necessary, is urged.

Two serious errors by the District Court, and sanctioned without discussion by a majority of a panel of this Court, are respectfully submitted herein. First, the ruling of the District Court that Japanese law contains the same governing principles of the law of contracts as "American Contract law", and that it need not decide which state law governs. The Court thereby not only relied upon a long rejected doctrine of a transcendental body of law outside of any particular state, but ruled that it is the duty of the appellant, rather than the appellee, to plead and prove this substantive basis for relief. Clear reversible error.

The second most serious error is the District Court's misinterpretation of clear plain language as ambiguous and, worse yet, considering it a justification for applying rules of construction to provisions of the policy which were not in issue. This resulted in the Court's holding that a landing license granted to an air taxi carrier, expressly denominated a "Revocable Permit," constituted a contract. Worst of all, this "contract" was then ruled to be one making the particular flight in which the purchaser of the policy lost his life one "contracted for by MATS" within the meaning of the policy.

It is respectfully urged that a rehearing, one *en banc* if necessary, is not only appropriate but essential to a proper consideration of the issues herein, so well recognized by the member of the Division registering the vigorous dissent.

Respectfully submitted,

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Certificate of Good Faith

I certify that the foregoing Petition is presented in good faith and not for the purpose of delay.

JOHN JOSEPH LEAHY
Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,815

MUTUAL BENEFIT HEALTH AND
ACCIDENT ASSOCIATION,

Appellant

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 12 1965

v.

MRS. JOSEPHINE L. MESSINA,

Appellee

Nathan J. Paulson
CLERK

OPPOSITION TO MOTION OF APPELLANT FOR
REHEARING

The appellee, Josephine L. Messina, by her counsel, opposes the petition of appellant for rehearing by panel or, in the alternative, for rehearing in banc and as grounds therefor says:

1. Appellant, in Part I of its argument asserts that, in the District of Columbia, the law of the place in which a contract was executed invariably governs the interpretation of that contract. In point of fact, however, no such mechanistic rule has been applied by the courts in this jurisdiction. The very case cited by appellant, Croissant v. Empire State Realty Company, 29 App. D. C. 538 (1907) stated a much broader and more flexible rule:

"The general principle is that a contract is to be governed by the law

with a view to which it was made, and this is a question of intention, to be deduced, when not expressly declared, from the place, terms, character, and purposes of the transaction." (Emphasis added) 29 App. D. C. at 547.

This rule was again applied by this Court in Fisk Rubber Company v. Muller, 42 App. D. C. 49 (1914) which involved a contract of suretyship which had been signed by the obligee in Massachusetts. Since the contract was void in the District of Columbia, the obligee contended that it should be governed by the law of Massachusetts. The court, looking to all of the circumstances of the contract, characterized the obligee's assertion as a "mere afterthought" and applied District of Columbia law since place of performance of the contract was the District. The court relied upon two Supreme Court cases, Coghlan v. South Carolina R. Co., 142 U.S. 101, 35 L. ed. 951, 12 S. Ct. 150 (1891) and Hall v. Cordell, 142 U. S. 116, 35 L. ed. 956, 12 S. Ct. 154 (1891). In both cases the Supreme Court rejected, without dissent, the contention now advanced by the appellant and held that the law of the place in which the contracts were made did not govern their interpretation. See also Cary v. U. S. Hoffman Machinery Corp., 148 F. Supp. 748 (D.C. D.C. 1957).

In the case at bar, the insurance contract in question was purchased by an American citizen en route to the United States from an American insurance company on a United States Air Force Base in Japan and names a citizen and resident of the United States as a beneficiary; and the insured died in the United States aboard an American plane. The contract itself is written in English, not Japanese, and uses American terms and terminology. Under these circumstances, and in the light of the above cited cases,

It would not make good sense to hold that Japanese law, with which neither party is likely to have been familiar, should govern. Moreover, appellant has never shown and at this late date does not even argue, that the result of this case under Japanese law would be any different; and seeks to have the Court save it by applying a strained burden-of-proof test.

Having decided that Japanese law was inapplicable to the interpretation of the insurance policy, both this Court and the lower Court properly determined that no decision need be made with respect to which American jurisdiction governed the interpretation of the policy in the absence of any contention by either party that there was a difference between the laws of any of the United States upon this subject. Appellant's contrary contention that the law of a particular jurisdiction must be selected is plainly in error. In the District of Columbia it seems clear beyond fair argument that, in the absence of some showing to the contrary, the common law of any state in the United States is presumed to be the same as that here. Boland v. Love, 95 U. S. App. D. C. 337, 341, 222 F. 2d 27, 32 (1955).

2. Appellant, in its petition, misrepresents appellee's argument when it states that it was "stipulated" that the only issue was whether the air taxi flight was one "contracted for by MATS" (see page 12 and 15 of appellant's petition for rehearing). Although appellee has relied upon this language (see, for example, Sec. II of appellee's brief), appellee has also argued in the District Court and in this Court that an ordinary traveller who purchases one of these form policies and quickly mails it off to the beneficiary could have understood that the policy

covered his entire and continuous air trip from the point of origin shown on the face of the policy to the destination shown; and he would have been unlikely to have been conscious of any doubt concerning the short connecting link from Travis Air Force Base to San Francisco International Airport. This argument, and the cases and authorities in support thereof, are fully set forth in Section I of appellee's brief.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition to Motion was this 12th day of July, 1965, mailed, postage prepaid to John Joseph Leahy, Esq., 532 Munsey Building, Washington, D. C., Attorney for Appellant

Aust. P. Frum